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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~712~~ 31

JAMES MONROE, ET AL., PETITIONERS,

vs.

FRANK PAPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1960
CERTIORARI GRANTED MARCH 28, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~712~~ 39

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12697

JAMES MONROE, et al., Plaintiffs-Appellants,

v.

FRANK PAPE, et al., Defendants-Appellees.

Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Julius Hoffman, Judge Presiding.

Appendix to Brief of Appellants—Filed August 21, 1959

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COMPLAINT—Filed March 2, 1959

Jurisdictional Allegation

Jurisdiction is invoked under 28 U.S.C.A. §§ 1331 and 1343 and 42 U.S.C.A. §§ 1983, 1985 and 1986 and Amendment XIV to the Constitution of the United States.

Count I

James Monroe, plaintiff, by his attorneys, Donald Page [fol. 2] Moore, Ernest Liebman, and Rogers, Rogers, Strayhorn & Harth, complaining of the defendants, Frank Pape, and John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, John Doe #6, John Doe #7, John Doe #8, John Doe #9, John Doe #10, John Doe #11, and John Doe #12 (whose true names are presently unknown) and the City of Chicago, a Municipal Corporation of the State of Illinois, says:

1. This action arises under the Constitution and laws of the United States and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs.

2. During all times herein mentioned, plaintiffs, and each of them, were, and they still are citizens of the United States or other persons within the jurisdiction thereof, and they resided, and now reside, in Chicago, Illinois.

3. During all times mentioned herein, the individual defendants, and each of them, were duly appointed, qualified [fol. 3] and acting police officers of the Police Department of the defendant City of Chicago, a voluntary municipal corporation of the State of Illinois, and were agents of the said City, acting in the course of their employment and engaged in the performance of their duties as police officers of the said City.

4. During all times mentioned herein, the defendants and each of them were assigned to, and acting under the orders of, that subdivision of the said Police Department which is commonly known as the "Detective Bureau."

5. During all times herein mentioned, the defendant Frank Pape was, and he still is, the Deputy Chief of Detectives of the Chicago Police Department and was, and he still is, the second ranking officer in the aforesaid "Detective Bureau" of the Chicago Police Department.

6. During all times herein mentioned the individual defendants and each of them were acting under color of the [fol. 4] statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the defendant City of Chicago.

7. The defendant City of Chicago is now, and at all times herein mentioned was, the employer of the individual defendants, and each of them. Said City at all times herein mentioned did, and does now, provide the individual defendants, and each of them, with an official badge and identification card, which designates and describes its bearer as an officer of the said City's Department of Police. Said City is the municipal corporation in the name of which the individual defendants, and each of them, performed all acts and omissions alleged herein.

8. During all times herein mentioned, the plaintiff James Monroe was:

(a) The lawful husband of the plaintiff Flossie Monroe;

(b) The father of the plaintiff James Monroe, Jr., a minor;

[fol. 5]. (c) The step-father of the plaintiffs Lawrence Stevens, Ralph Stevens, Robert Stevens, Houston Stevens and Jacqueline Stevens, all of whom are minors.

9. During all times herein mentioned, the plaintiff Flossie Monroe was:

(a) The lawful wife of the plaintiff James Monroe;

(b) The mother of the plaintiffs James Monroe, Jr., Lawrence Stevens, Ralph Stevens, Robert Stevens, Jacqueline Stevens, and Houston Stevens.

10. On or about October 29, 1958, at about 5:45 A.M., the plaintiffs, and each of them, were asleep in their beds in the apartment where they reside as a family, located at 1424 South Trumbull Avenue, Chicago, Illinois. Then and there, the individual defendants, and each of them, broke and entered into the apartment of the plaintiffs through the front and rear doors thereof, and did the following acts, [fol. 6] among others:

(a) Defendants Frank Pape, John Doe #1 and John Doe #2, entered the bedroom of the plaintiffs James Monroe and Flossie Monroe, where the said plaintiffs were asleep together in a bed. The aforesaid defendants then and there shined their flashlights upon the faces of James and Flossie Monroe. One of these three defendants commanded James Monroe to rise from his bed and walk into the living room, and as a result of this command the aforesaid James Monroe was forced to get out of his bed and walk into the living room stark naked and completely without clothing or other means to hide his nakedness. During the course of the aforesaid incident, the defendant Frank Pape, in the presence of Flossie Monroe, cursed James Monroe and threatened to shoot him if he did not obey the commands of the various defendants with alacrity. While James Monroe was thus forced to stand naked in the center of his living room his children and stepchildren, who are the plaintiffs described in Paragraphs 8 (b) and (c) and 9 (b), were [fol. 7] ordered into the aforesaid living room by the remaining defendants and forced to remain there in their night clothes.

(b) While the events stated in Paragraph 10 (a) were taking place, the defendant John Doe #1 was standing in the bedroom of James and Flossie Monroe. After James Monroe was forced at gun point to leave the aforesaid bedroom, the defendant John Doe #1 went to the bedroom closet and seized all the clothing therein and threw each article of clothing upon the floor, after scrutinizing the

said articles separately. Meanwhile, the defendant John Doe #2 ordered the plaintiff Flossie Monroe to rise from her bed and walk into the living room. The plaintiff Flossie Monroe objected to this command and refused to rise from her bed because of the fact that she was completely naked and unclothed as she lay in her bed. Thereupon the defendant John Doe #2 seized the plaintiff Flossie Monroe by the arm and pulled the plaintiff Flossie Monroe from [fol. 8] her bed while Flossie Monroe snatched a blanket with her free hand and attempted to hold the said blanket before her in order to hide her nakedness from the aforesaid defendants. The plaintiff Flossie Monroe was then pushed, shoved and escorted into the living room where she was forced and compelled to stand beside her husband, the plaintiff James Monroe.

(c) At the time that the plaintiff Flossie Monroe was pushed, shoved and escorted into the aforesaid living room, the defendant Frank Pape repeatedly hit, struck, and jabbed a flashlight into the stomach of the plaintiff James Monroe while berating him, questioning him and referring to his race in derogatory terms, such as "nigger" and "black-boy."

(d) During the course of the events described in Paragraph 10 (a), (b) and (c) the defendant John Doe #3 kicked the plaintiff James Monroe, Jr., who is a 4-year old child, and, as a result thereof, the plaintiff James Monroe, Jr. fell to the floor and commenced to cry and wail loudly. [fol. 9] (e) Immediately after the events described in Paragraph 10 (a), (b), (c) and (d), the defendant Frank Pape struck the plaintiff Robert Stevens, knocking him down.

(f) Immediately after the event described in Paragraph 10 (e), the defendant Frank Pape pushed and shoved the plaintiff Houston Stevens in such a manner that the plaintiff Houston Stevens fell across and on top of the plaintiff Robert Stevens.

(g) At approximately the same time that the events described in Paragraph 10 (e) and (f) were taking place, or immediately thereafter, the plaintiff Jacqueline Stevens attempted to leave the aforesaid apartment by way of a

back door in an effort to reach a telephone so that she might call a friend of the family and inform him of the foregoing events. Thereupon, the defendant John Doe #5 blocked the access of the plaintiff Jacqueline Stevens to the aforesaid back door and when Jacqueline Stevens further attempted to make her way past the defendant John [fol. 10] Doe #5, the aforesaid defendant pushed her to the floor and denied her access to the aforesaid back door and the aforesaid telephone.

(h) During the course of, and immediately after, the events described in Paragraph 10, sub-paragraphs (a) through (g), the individual defendants and each of them proceeded to search each and every room of the apartment aforesaid. In the course of this search the defendants emptied all the drawers in the said apartment and dumped the contents of the said drawers upon the floor of the said apartment. Further, the defendants ripped and cut the coverings from various of the mattresses which they found upon the beds in the said apartment and threw the contents of all the closets in the apartment on the floor.

(i) Subsequent to the events related in sub-paragraph (a) through (h), the defendants selected and carried some articles of clothing into the living room and ordered the plaintiff James Monroe to dress himself. Thereupon, two [fol. 11] of the defendants produced a pair of manacles or handcuffs, and with them chained the hands of the plaintiff James Monroe together. Thereupon, the individual defendants, and each of them escorted the plaintiff James Monroe from the aforesaid apartment to an automobile, which was parked in an alley adjoining the building at 1424 South Trumbull Avenue, Chicago, Illinois.

(j) As the defendants were escorting the plaintiff James Monroe to the automobile described in sub-paragraph (i) above, the plaintiff Flossie Monroe asked several of the aforesaid individual defendants where they were taking her husband, James Monroe. The defendant Frank Pape in response to this question, told Flossie Monroe that James Monroe was to be taken to a police station "for questioning."

11. None of the individual defendants, at any of the times mentioned herein, and, more particularly, at the time and place of the events alleged in Paragraph 10 above, had in his possession any warrant issued by any judge, court, or magistrate authorizing:

[fol. 12] (a) A search of the aforesaid apartment; or

(b) The arrest of the plaintiff James Monroe; nor had any warrants in fact been issued by any judge, court or magistrate for the said arrest or search.

12. After the events described in Paragraph 10 (j) four of the individual defendants seated themselves in the automobile described in Paragraph 10 (j). One of these four individual defendants was the defendant Frank Pape. The four individual defendants thereupon proceeded in the aforesaid automobile from the alley adjoining the building at 1424 South Trumbull Avenue to the corner of Roosevelt Road and Homan Avenue, Chicago, Illinois, where the aforesaid automobile was parked and remained parked for approximately thirty minutes, while the plaintiff James Monroe and his captors remained seated therein.

13. At the conclusion of the events described in Paragraph 12, the individual defendants described in Paragraph 12 caused the plaintiff to be carried in the aforesaid auto-
[fol. 13] mobile to the Central Police Headquarters of the Police Department of the defendant City of Chicago which headquarters is located at 1121 South State Street, Chicago, Illinois.

14. Upon his arrival at the aforesaid Central Police Headquarters at or about 6:00 o'clock A.M., the plaintiff James Monroe was placed in a locked and barred jail cell therein and was there imprisoned for approximately ten hours. During the course of this ten-hour period, the plaintiff was from time to time removed from the aforesaid jail cell and placed upon exhibition in a line of other individuals so that various persons could observe him and them. Also, during the aforesaid ten-hour period the plaintiff James Monroe was subjected to intermittent interrogation concerning the alleged murder of an individual named Peter

Saisi, who had been allegedly killed and murdered on October 27, 1958.

15. (a) Throughout the aforesaid ten-hour imprisonment, the plaintiff, James Monroe:

[fol. 14] (1) Was never brought before a judge, court or magistrate;

(2) Was never charged with a crime;

(3) Was never able to make bail or post a bond for his release because no bail had been set in his "case";

(4) Was not permitted to contact his attorney, his family, or his friends, and thereby inform them of his whereabouts, the circumstances of his imprisonment, and thereby also to obtain counsel and advice;

(5) Was not informed of any formal charges which were to be placed against him by the police or by any other person persons;

(6) Was not informed of his privilege against self-incrimination;

(7) Was not informed of his right to the advice of any attorney.

Instead, the plaintiff James Monroe was detained and imprisoned by the defendants and all of them upon the purported justification that he had been arrested and was held [fol. 15] for "investigation," on "open" charges, by which terminology the defendants meant that he was not being held to answer to a charge of a violation of a statute or ordinance, but instead was being held without legal charge for the purpose of being investigated and interrogated and placed upon exhibition for viewing by the various victims of various alleged crimes and by various police officers. This aforesaid imprisonment of the plaintiff James Monroe was committed by the defendants, and all of them, pursuant to the custom and usage hereinafter alleged in Paragraph 17 of this Count.

(b) At the conclusion of the aforesaid ten-hour imprisonment, the plaintiff James Monroe was released from custody

by the defendants. He was not then charged with a crime or violation of ordinance, nor has he ever subsequently been so charged.

16. Throughout some or all of the period of plaintiff's imprisonment by the police, the following branches among others of the Municipal Court of the City of Chicago were [fol. 16] in session in the Central Police Headquarters at 1121 South State Street, Chicago, Illinois:

Branch 27
Branch 40
Branch 41
Branch 42

Throughout some or all of the period of plaintiff's imprisonment by the police, the following additional branches (among others) of the Municipal Court of Chicago were in session in the City of Chicago:

Branch 25
Branch 28
Branch 30
Branch 32
Branch 34
Branch 35
Branch 36
Branch 38
Branch 39
Branch 43
Branch 44
Branch 46
Branch 47
Branch 52
Branch 54
Branch 57

All of the aforesaid branches have jurisdiction to grant police officers leave to file criminal and quasi-criminal complaints against arrested persons and have jurisdiction to [fol. 17] admit arrested persons to bail.

17. At all times herein mentioned, it was, and it is now, the custom or usage of the Police Department of the City

of Chicago to arrest and confine individuals in the police stations and jail cells of the said department for long periods of time on "open" charges. The said confinements on "open" charges are not for the purpose of detaining the arrested individual so that he might be promptly brought to court to answer to a charge of violation of the law, but are for the purpose of investigating and interrogating said individuals for some one or more of the following reasons:

(a) So that the said individuals may be induced, persuaded or coerced into making incriminating statements about themselves or others;

(b) So that the said individuals may be placed on exhibition before police officers and civilians for possible identification as having been the perpetrators of some crime or crimes;

(c) So that the said individuals may be held incommunicado while police officers are investigating and checking upon their character, occupation, associates and activities prior to their arrest;

(d) So that punishment of the said individuals by means of imprisoning them for varying periods of time might be inflicted by officers of the Chicago Police Department without a trial in a court of law.

18. The aforesaid acts of the defendants constituted a violation of the Constitution and laws of the United States of America, in that the plaintiffs, and each of them, were deprived by the defendants, and each of them, of their right to be secure in their home against arbitrary and unreasonable searches and seizures and of their right not to be deprived of their lives, liberties and property, without due process of law, all in violation of Amendment XIV of the United States Constitution and 28 U.S.C.A. § 1343 (3) and [fol. 19] 42 U.S.C.A. § 1983.

19. On January 26, 1959, the following notice of claim for personal injuries was served upon John C. Marcin, City Clerk of the City of Chicago, and John C. Melaniphy, Corporation Counsel of the City of Chicago, * * * (here

follows the text of the formal notice of claim for personal injuries filed on behalf of each of the plaintiffs in this case).

20. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and will in the future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore plaintiff James Monroe demands judgment against the defendants and each of them, jointly and sev- [fol. 20] erally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count II

1-19. Plaintiff James Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 19 of Count I of this complaint.

20. Prior to the events alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiff James Monroe the equal protection of the laws and with the intent [fol. 21] to injure him for wrongfully enforcing or attempting to enforce his rights to the equal protection of the laws in that the individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U.S.C.A. § 1985 and 28 U.S.C.A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants and each of them the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and in the future will [fol. 22] lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff James Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count III

1-21. Plaintiff James Monroe incorporates and realleges herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint, and Paragraphs 20 and 21 of Count II of this complaint.

22. Prior to the commission of the wrongs conspired [fol. 23] to be done, as described in Paragraphs 1-21 of this Count, each of the defendants had knowledge of said conspiracy and of the objective thereof, and any one of said defendants had the power by reasonable diligence to prevent or aid in preventing the commission of the said wrongs. Nevertheless, none of the defendants made any effort to prevent or aid in preventing the commission of said wrongs. Therefore, each and every one of the defendants has violated the provisions of 42 U.S.C.A. § 1986.

23. As a direct and proximate result of the foregoing acts and failures to act of the defendants, and each of them,

the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts and failures [fol. 24] to act of the defendants.

Wherefore, plaintiff James Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count IV

1-19. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 19 of Count I of this complaint.

20. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue [fol. 25] so to suffer in the future; and she has lost and will in the future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, Plaintiff Flossie Monroe demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

Count V

1-19. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 19 of Count I of this complaint.

[fol. 26] 20. Prior to the event alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiff Flossie Monroe the equal protection of the laws and with the intent to injure her for wrongfully enforcing or attempting to enforce her rights to the equal protection of the laws in that the individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U.S.C.A. 1985 [fol. 27] and 28 U.S.C.A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants and each of them the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Flossie Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and she further demands punitive damages against the defendants and each of them jointly and severally, in the amount of One Hun-

dred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

[fol. 28] Count VI

1-19. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20-21. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 20 and 21 of Count V of this complaint.

22. Plaintiff Flossie Monroe incorporates and realleges herein Paragraph 22 of Count III of this complaint.

23. As a direct and proximate result of the foregoing acts and failures to act of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts and failures to act of the defendants.

[fol. 29] Wherefore, plaintiff Flossie Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

Count VII

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20. As a direct and proximate result of the aforesaid [fol. 30] acts of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Steven Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

(Here follow separate prayers for relief on behalf of [fol. 31] Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr. These prayers for relief contain the identical wording as is contained in the prayer for relief of Houston Stevens, above).

Count VIII

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20. Prior to the event alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, [fol. 32] Jacqueline Stevens and James Monroe, Jr. the equal protection of the laws and with the intent to injure them for wrongfully enforcing or attempting to enforce their rights to the equal protection of the laws in that the

individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U.S.C.A. § 1985 and 28 U.S.C.A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiffs Houston [fol. 33] Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

(Here follow separate prayers for relief on behalf of Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr. These prayers for relief contain the identical wording as is contained in the [fol. 34] prayer for relief of Houston Stevens, above).

Count IX

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend)

incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20-21. The above plaintiffs incorporate and reallege herein Paragraphs 20 and 21 of Count VIII of this complaint.

22. The above plaintiffs incorporate and reallege herein Paragraph 22 of Count III of this complaint.

23. As a direct and proximate result of the aforesaid acts and failures to act of the defendants, and each of [fol. 35] them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish; from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts and failures to act of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

[fol. 36] (Here follow separate prayers for relief on behalf of Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr. These prayers for relief contain the identical wording as is contained in the prayer for relief of Houston Stevens, above).

James Monroe, Flossie Monroe, and Houston Stevens (a minor), Robert Stevens (a minor), Lawrence Stevens (a minor), Ralph Stevens (a minor), Jacqueline Stevens (a minor), and James Monroe, Jr. (a minor), by Flossie Monroe, their mother and next best friend, Plaintiffs, By Donald Page Moore, Ernst Liebman, and Rogers, Rogers, Strayhorn & Harth, their attorneys, 105 West Adams Street, Chicago 3, Illinois, STate 2-1776.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed March 20, 1959

Now come the defendants, Frank Pape and the City of Chicago, a municipal corporation, by their attorney John C. Melaniphy, Corporation Counsel of the City of Chicago, [fol. 37] and move this Honorable Court to dismiss the complaint of the plaintiffs herein, for lack of jurisdiction over the subject matter or in the alternative for failure to state a claim upon which relief can be granted, for the following reasons:

The defendant, City of Chicago, in operating its Police Department is engaged in the performance of a governmental function and, therefore, is not liable to the plaintiff for the acts of its Police Department employees.

The plaintiffs' Complaint fails to show that the said defendants violated the plaintiffs' Federal Civil Rights, under the Civil Rights Statutes or the Constitution of the United States.

Further, the City of Chicago being a municipal corporation is not liable to the plaintiffs for the alleged violation of their civil rights under the Civil Rights Statutes.

[fol. 38] Frank Pape and City of Chicago, a municipal corporation, Defendants, John C. Melaniphy, Corporation Counsel of City of Chicago, Attorney for Defendants, By Edward R. Hartigan, Assistant Corporation Counsel, James P. Daley.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND DENYING LEAVE TO AMEND—June 5, 1959

After careful consideration of the briefs of counsel and the Court being fully advised it is

Ordered that the defendants' motion to dismiss the complaint be and it hereby is allowed and that the complaint be and it hereby is dismissed and it is

Further Ordered that the plaintiffs' motion for leave to file an amended complaint be and it hereby is denied.

[fol. 39]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 5, 1959

Notice is hereby given that the plaintiffs and each of them hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final order dismissing the plaintiffs' complaint entered in the above entitled cause on June 5, 1959.

Dated: June 5, 1959.

Donald Page Moore, One of the Attorneys for the Plaintiffs.

Certificate of Service (omitted in printing).

[fol. 40]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12697

(Title omitted)

Appellees' Appendix—Filed September 17, 1959

[File endorsement omitted]

[fol. 41]

IN THE UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

No. 59 C 329.

JAMES MONROE, et al., Plaintiffs,

—v.—

FRANK PAPE, et al., Defendants.

Transcript of Proceedings of June 5, 1959

Transcript of Proceedings had at the hearing of the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, sitting in his courtroom in the United States Court House at Chicago, Illinois on Friday, June 5, 1959, at 10:00 o'clock a. m.

The Clerk: 59 C 329, James Monroe *vs.* Frank Pape, et al., Decision on Defendant's Motion to Dismiss Complaint.

[fol. 42]

MEMORANDUM OPINION ON MOTION TO DISMISS COMPLAINT—June 5, 1959

The Court: I had you come in here, gentlemen, because I thought I ought to give you some reasons for deciding this motion which is important.

This action, as we know, is based upon the Civil Rights Act, 42 U. S. C., Sections 1983, 1985 and 1986, and the Fourteenth Amendment of the United States Constitution.

The plaintiffs are James Monroe and Flossie Monroe, husband and wife, and six children represented by their mother, Flossie Monroe, as next friend.

The defendants are Frank Pape of the City of Chicago Police Department, twelve unknown police officers designated as John Doe No. 1 to and including No. 12, and the City of Chicago.

Count 1 of the complaint charges that on or about October 29, 1958, at about 5:45 a. m., while the plaintiffs were

asleep in their bed, the defendants broke into the plaintiffs' apartment from both the front and the rear doors and according to the complaint the following events occurred:

Frank Pape and John Doe No. 1 and 2 entered the bedroom of James and Flossie Monroe, flashed their—shall we call them flashlights?

Mr. Moore: Yes, your Honor.

The Court: —upon them and pointed pistols at them and commanded James Monroe to walk into the living room while he was naked.

At this time Frank Pape allegedly cursed James Monroe and threatened to shoot him if he did not obey the various commands of the defendant. Thereupon James Monroe was forced to stand naked in his living room and his children and step-children, also plaintiffs in this case, were ordered into the living room and forced to remain in their night clothes.

During the time of these alleged occurrences, the defendant John Doe No. 1 went into the bedroom closet, seized the clothing in the closet and threw each article on [fol. 43] the floor. At the same time John Doe No. 2 ordered Flossie Monroe from her bed while she was naked, but according to the complaint she was able to snatch a blanket to cover her nakedness. She was then pushed and escorted into the living room and forced to stand beside her husband James Monroe.

The complaint goes on to allege that while Flossie Monroe was being pushed into the living room, the defendant Frank Pape repeatedly hit and struck James Monroe and jabbed a flashlight into his stomach and referred to him as a "nigger" and "black boy."

Count 1 also alleges that the defendant John Doe No. 3 kicked the plaintiff James Monroe, Jr., a four year old child, and caused him to fall to the floor crying. Then Frank Pape struck the plaintiff Robert Stevens and knocked him down. The complaint goes on to allege that Frank Pape pushed and shoved the plaintiff Houston Stevens so that he fell across Robert Stevens. When Frank Pape struck Robert Stevens and pushed Houston Stevens, the plaintiff Jacqueline Stevens attempted to leave the apartment by the back door in order to reach a telephone.

and John Doe No. 5 blocked her access to the back door and pushed her to the floor.

Count 1 further alleges that the defendants searched each and every room of the apartment, emptied all the drawers in the apartment and dumped their contents on the floor. The defendants also ripped and cut mattress coverings of the beds and threw the contents of all closets on the floor. Thereafter the defendants provided James Monroe with clothing, handcuffed him and escorted him to a parked automobile. The defendants told Flossie Monroe that James Monroe was being taken to a police station for questioning.

Count 1 alleges that these acts were committed by the individual defendants, none of whom had a warrant for the [fol. 44] search of the apartment or a warrant for the arrest of James Monroe.

Count 1 also alleges that after James Monroe was escorted to the automobile, four defendants, including Frank Pape, drove the plaintiff to the corner of Roosevelt Road and Homan Avenue in Chicago and parked the automobile, and it remained there for approximately 30 minutes. These defendants then transported James Monroe to the Central Police Headquarters of the Chicago Police Department.

After his arrival at the Central Headquarters at or about 6:00 o'clock in the morning, James Monroe was imprisoned approximately ten hours and was from time to time placed upon exhibition in a so-called "line-up".

In addition, Count 1 alleges that during the incarceration, James Monroe was subjected to intermittent interrogation concerning the alleged murder of one Peter Saisi.

The complaint asserts that during the incarceration, James Monroe was never brought before a judge, court or magistrate; was never charged with a crime; was never allowed to make bail or post bond; was not permitted to contact his attorney, friends or family; was not informed of any formal charges placed against him; was not informed of his privilege against self-incrimination, and was not informed of his right to counsel.

At the conclusion of the 10 hour period of incarceration, James Monroe was released from custody by the defendants without having been charged with any crime.

Count 2 of the complaint alleges that prior to the acts alleged in Count 1, the individual defendants entered into a conspiracy with each other for the purpose of defeating the due course of justice and to deny James Monroe the equal protection of the law.

Count 2 asserts that the individual defendants deprived James Monroe of his civil and constitutional rights and violated Section 1985 of the Civil Rights Act by conspiring to commit the acts alleged in Count 1 of the complaint. [fol. 45] Count 3 alleges that the defendants had knowledge of the conspiracy alleged in Count 2 and the power to prevent the conspiracy but failed to do so. This failure is asserted to be a violation of Section 1986 of the Civil Rights Act.

In Count 4 of the complaint, the plaintiff Flossie Monroe seeks damages for the same acts alleged by James Monroe in Count 1 which were committed against her by the defendants.

She alleges in Count 5 that the defendants violated Section 1985 of the Civil Rights Act when they committed the conspiracy alleged by James Monroe in Count 2.

In Count 6 she alleges that the defendants had knowledge of the conspiracy and failed to prevent its commission and therefore violated Section 1986 of the Civil Rights Act.

In Counts 7, 8 and 9, respectively, the minor plaintiffs, Houston Stevens, Robert Stevens, Lawrence Stevens, Jacqueline Stevens and James Monroe, Jr., allege that the defendants committed the same acts alleged by James Monroe in Count 1, the same conspiracy alleged by James Monroe in Count 2, and the same failure of defendants to prevent the conspiracy alleged by James Monroe in Count 3.

The defendants Frank Pape and the City of Chicago have moved to dismiss the complaint because it fails to state a claim upon which relief may be granted.

Now as to Frank Pape, there are eight plaintiffs in this action, each of whom has alleged a claim for relief based upon the same facts alleged by James Monroe in Count 1 of the complaint. Therefore, I shall not treat each plaintiff separately since the factual allegations are lengthy. I shall

characterize or describe the acts of the defendants in the same manner in which the plaintiff has characterized them.

Dealing with the subject of search and seizure, Count 1 of the complaint alleges that the defendants Pape and the John Doe police officers broke and entered into the plain-[fol. 46] tiff's family apartment at 5:45 a. m. on October 29, 1958; that the defendants had no search warrant and that the search was arbitrary and unreasonable. The plaintiffs contend that this search and seizure is a violation of 42 United States Code, Section 1983.

The defendant argues that the plaintiffs have failed to allege that any evidence which might be used against the plaintiff was obtained by the illegal search and that therefore 42 U. S. C., Section 1983, was not violated.

The Supreme Court has recently said that "the security of one's privacy against arbitrary intrusion by the police is fundamental to a free society and as such protected by the Fourteenth Amendment." *Frank* v. *Maryland* decided by the Supreme Court on May 4, 1959; *Wolf* v. *Colorado*, 338 U. S. 25, at 27, decided in 1948.

Although the Fourteenth Amendment prohibits unreasonable searches by state officers, there is a limitation as to how far the federal government can and should go in supervising activities of state and local law enforcement agencies. See *Wolf* v. *Colorado* to which I have previously referred; an article by Allen on the *Wolf* Case, Search and Seizure, Federalism and the Civil Liberties, 45 Ill. Law Review 1, written and published in 1950.

This reasoned limitation was applied in *Mackey* v. *Chandler*, 152 Fed. Supp. 579, Western District of South Carolina, 1957. The *Mackey* case held that the Civil Rights Act did not provide a cause of action against state officers who unreasonably searched an individual's home. The Court stated:

> "The exemption from unreasonable searches and seizures is not one of the privileges and immunities of the citizens of the United States which the Fourteenth Amendment forbids the state to abridge, nor is it an element of due process of law guaranteed by the latter

amendment against state action." That at page 582 of that opinion.

[fol. 47] The Court in the *Mackey* case relied heavily upon the case of *Jennings* v. *Nester*, 217 F. 2d 153 decided by our Circuit in 1954 which involved an allegation of unlawful search of the person. Although the Court in the *Jennings* case did not deal expressly with this allegation, the Court held that the complaint did not state a claim for relief under the Civil Rights Act. In reaching this conclusion, the Court asserted that the Civil Rights Act was not designed to discipline state police officers and that the common law provides adequate actions for damages against errant police officers.

Although the *Mackey* case has been criticized, see Comment, Civil Rights Act Section 1983 and Illegal Search by State Officers, 10 Stanford Law Review 335 published in 1958, and the actions of the defendants, if true, may not be as we would like our police officers to behave,—and I don't know whether they are true or not—the search of the plaintiffs' apartment without a search warrant is not a violation of the Civil Rights Act, Section 1983. The only two cases which have been presented with this issue have concurred in that result. *Jennings* v. *Nester*, to which I have previously alluded, and the *Mackey* case, also referred to.

Now as to the brutality, alleged brutality, Count 1 of the complaint alleges that Frank Pape committed batteries on James Monroe, Robert Stevens and Houston Stevens. In addition, Count 1 alleges that batteries were committed in Pape's presence by his fellow officers upon Flossie Monroe, Jacqueline Stevens and James Monroe, Jr. The plaintiffs argue that an intentional assault by an individual acting under state authority is a violation of the Civil Rights Act.

The defendant argues that an assault does not violate an individual's civil rights. The defendant is correct in this contention. An assault, without more, does not constitute a violation of the Civil Rights Act. *Screws* v. *United States*, [fol. 48] 325 U. S. 91. In that case decided in 1945, the Court stated:

"The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected by or secured by the Constitution or laws of the United States." That from page 108 of that opinion.

In *Miles* v. *Armstrong*, 207 F. 2d 284, decided by our circuit in 1953, it was held that an aggravated assault did not violate the privileges and immunities clause of the Fourteenth Amendment. The Court in that case at page 187 said:

"The injuries he asserts he has suffered are, in essence, an aggravated assault upon his person and wanton destruction of his property—grievous injuries surely. But they do not constitute privileges and immunities incident to United States citizenship; they are rather such that the perpetrators are punishable under state law where reparation may be obtained."

Accord: *United States ex rel. Atterbury* v. *Ragen*, 237 F. 2d 953, again decided by our circuit in 1956; *Knight* v. *Bibb*, 250 F. 2d 283, decided by the Seventh Circuit in 1957.

It is true that the *Miles* case was concerned with Section 1985 rather than Section 1983 upon which the plaintiffs rely in the case at bar, and it is equally true that Section 1983 is broader than Section 1985 in that 1983 embraces violations of due process and such violations are not embraced by 1985. However, I have been unable to find any case which holds that an assault unaccompanied by other circumstances perpetrated by state officers constitutes a violation of due process rights.

There is nothing more than an allegation of assault and battery stated by the plaintiffs in the case at bar. There is no allegation that the assault and battery on any of the plaintiffs was designed to elicit "information and/or con- [fol. 49] fessions." See *Geach* v. *Moynahan*, 207 F. 2d 714, Seventh Circuit, 1953.

I am of the opinion, therefore, that the brutality allegations of the plaintiff's complaint do not state a claim upon which relief may be granted under the Civil Rights Act.

Now as to the so-called incommunicado detention. Count 1 alleges among other things that James Monroe was arrested without a warrant and held for 10 hours for interrogation and was exhibited in police line-ups. In addition Count 1 alleges that James Monroe was never charged with any crime and was denied the right to bail and the advice of counsel.

The plaintiff James Monroe argues that such incommunicado detention was a denial of due process of law in violation of the Civil Rights Act.

The defendant asserts that false arrest and false imprisonment are not violations of the Civil Rights Act.

In the recent case of *Stitt* v. *Lynch* decided by the Seventh Circuit on May 11, 1959, not yet in the books, an action was brought under the Civil Rights Act against a sheriff and his deputy for false arrest, for false imprisonment, and the alleged failure to charge the plaintiffs therein with a crime until after the expiration of about two hours. The Court held that such acts did not violate the Civil Rights Act. Accord: *Iglesias* v. *Gulfstream Park Racing Association, Inc.*, 201 F. 2d 817 decided by the Fifth Circuit in 1953; *Dinneen* v. *Williams*, 219 F. 2d 428, decided by the Ninth Circuit in 1955.

We come now to a discussion of the conspiracy allegation. In addition to the charge that the defendants violated Section 1983 of the Civil Rights Act, the complaint asserts that a conspiracy existed between the defendants pursuant to which they illegally searched the plaintiff's apartment, assaulted various plaintiffs, seized James Monroe and imprisoned him for ten hours. The plaintiffs as- [fol. 50] sert that this conspiracy was a deprivation of equal protection and in violation of Section 1985.

The defendant contends that the complaint fails to allege wherein the plaintiff was deprived of equal protection.

It must be pointed out that Section 1983 of the Civil Rights Act provides a claim for relief for a deprivation of due process, and Section 1985 provides relief for deprivation of equal protection.

Section 1983 does not mention conspiracy but Section 1985 does; therefore, the Civil Rights Act provides a claim,

for conspiracy to deny equal protection but not for a conspiracy to deny due process. See *Jennings* v. *Nester*, to which I have previously alluded; *Ortega* v. *Ragen*, 216 F. 2d 561, a case which I had something to do with in the trial court; *Mitchell* v. *Greenough*, 100 F. 2d 184, decided by the Ninth Circuit in 1938.

The conclusory allegations of the complaint do not embody a claim for relief. Indeed, it has been held that where the complaint characterizes the acts of the defendants as malicious, conspiratorial and done for the purpose of depriving plaintiffs of their constitutional rights, such allegations must be disregarded on a motion to dismiss. *McGuire* v. *Todd*, 198 F. 2d 60, decided by the Fifth Circuit in 1952; *Dunn* v. *Gazzola*, 216 F. 2d 709, a First Circuit case decided in 1954, and the *Ortega* case to which I have previously referred.

In the case at bar, the plaintiffs have made no factual allegations which support the assertion that the plaintiffs were denied equal protection of the law. As the Court stated in the *Jennings* v. *Nester* case at page 154:

> "The complaint clearly does not state a cause of action for a denial of equal protection. Although it alleges improper acts on the part of the defendants, there is nothing to indicate that every citizen of Illinois is not potentially subject to the same treatment."

[fol. 51] The plaintiffs rely upon the case of *Wakat* v. *Harlib*, 253 F. 2d 59, decided by our circuit in 1958, in support of their contention that the defendants violated Section 1985.

Although the *Wakat* case contains language which indicates that Section 1985 may be violated when state officers discriminate against an individual rather than a class, the language has been held to be unnecessary and dicta. *Stiff* v. *Lynch* to which I have previously referred.

In the *Wakat* case the plaintiff was described as a well known criminal and as such was denied equal protection by a police regulation having the force of law. Since the plaintiffs in the case at bar have not alleged that they

were treated in a manner by the defendants which differs from the treatment others may suffer, they have not stated a claim upon which relief may be granted under Section 1985.

Now as to the alleged failure to prevent conspiracy, the plaintiffs allege that Pape and the John Doe police officers failed to prevent the alleged conspiracy which violated Section 1985 of the Civil Rights Act, and therefore violated Section 1986 of the Civil Rights Act.

Section 1986 provides in pertinent part that:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action."

The plaintiffs assert that if the conspiracy allegations state a claim for relief under Section 1985, the allegations [fol. 52] with respect to the failure to prevent the conspiracy also state a claim for relief.

Since the conspiracy allegations do not state a claim upon which relief may be granted, the allegations of failure to prevent a conspiracy are similarly defective.

Now as to the City of Chicago, the defendant City of Chicago bases its motion to dismiss upon the ground that a municipal corporation is not liable for the wrongful acts of its police and that this immunity extends to a Civil Rights Act.

The plaintiffs argue, inter alia, that Congress did not intend that the Civil Rights Act should include municipal immunity; that the word "person" as used in the Civil Rights Act was intended to include a municipal corporation as well as any other person; that the need for uni-

formity throughout the various states dictates that municipal corporations be held liable under the Civil Rights Act; and that in some cases relief has been granted against municipal corporations in actions under the Civil Rights Act.

Although it has been held that municipal corporations are not liable under the Civil Rights Act, *Agnew* v. *City of Compton*, 239 F. 2d 226, decided by the Ninth Circuit in 1956; *Charlton* v. *City of Hialeah*, 188 F. 2d 421, decided by the Fifth Circuit in 1951, this immunity for the municipality has been drawn from the common law of the state in which the action arose.

In Illinois, the recent decision of *Molitor* v. *Kaneland Community Unit District 302*, Law Week 27-2609, June 2, 1959, strongly indicates that the doctrine of municipal immunity has been abandoned.

The *Molitor* case involved an action by a pupil against a school district for injuries sustained by the pupil while riding in a school bus. The Supreme Court of Illinois decided that although a school district had heretofore been [fol. 53] protected from liability for the negligent acts of its agents, the doctrine of immunity which gave such a protection was no longer sound or just under modern conditions.

It should be noted that the *Molitor* case did not involve a municipal corporation.

In the case at bar, it is unnecessary to apply or interpret the *Molitor* decision since the liability of the City of Chicago is based upon the doctrine of *respondeat superior*, and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself.

Since the plaintiffs have not alleged any facts which support their conclusory allegations that the defendants violated the Civil Rights Act, the defendants' motion to dismiss, Mr. Clark, will be allowed, and the complaint will be dismissed.

Mr. Moore: If the Court please, may we have leave to file an amended complaint?

The Court: No, I think I will let that order stand. I went into this very thoroughly. You have got a big, long

complaint and we spent a lot of time on it, and I don't—moreover, counsel for the defendant has gone.

I will let my order stand as it is.

Mr. Moore: Thank you, your Honor.

[fol. 54] Reporters Certificate to foregoing transcript (omitted in printing).

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12697

September Term and Session, 1959

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JAMES MONROE et al., Plaintiffs-Appellants,

—v.—

FRANK PAPE et al., Defendants-Appellees.

OPINION—November 23, 1959

Before: HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*:

This action was brought in the district court under the Federal Civil Rights Act, 42 U.S.C.A. §§ 1983, 1985 and 1986, to recover damages for the alleged misconduct of the defendant Chicago, Illinois police officers. Such misconduct was claimed to be in violation of the rights of plaintiffs under the Fourteent.. Amendment to the Constitution of the United States. The City of Chicago, Illinois was joined as a

defendant, liability being predicated on the doctrine of *respondeat superior*. The trial court entered an order dismissing the complaint on defendants' motion on the ground that the complaint failed to state a cause of action under the Act, then denied leave to amend; this appeal followed.

The plaintiffs are James Monroe and Flossie Monroe, husband and wife, and their six children represented by their mother, Flossie Monroe, as next friend. The defendants are Frank Pape, Deputy Chief of Detectives [fol. 57] of the Chicago Police Department, and twelve unknown police officers assigned to the Detective Bureau designated as John Doe No. 1 to and including No. 12, and the City of Chicago, Illinois. The complaint contains nine counts.

Counts charging violation of 42 U.S.C.A. § 1983 are Counts I, IV and VII. Count I contains the basic factual allegations constituting plaintiffs' cause of action and seeks recovery of damages for James Monroe. Count IV incorporates the facts alleged in Count I and seeks recovery for Flossie Monroe, as does Count VII on behalf of the six Monroe children.

Counts charging violation of 42 U.S.C.A. § 1985 are Counts II, V and VIII, charging a conspiracy of defendants to commit the acts alleged in Count I, again praying damages for James Monroe, Flossie Monroe and the six Monroe children, respectively.

Counts charging violation of 42 U.S.C.A. § 1986 are Counts III, VI and IX, charging failure of each of the defendants to make any effort to prevent the accomplishment of the above conspiracy and seeking recovery for James Monroe, Flossie Monroe and the six Monroe children, respectively.

The complaint alleges an unreasonable search and seizure, a series of unjustified batteries and a long, inherently coercive and unjustifiably secret detention committed against plaintiffs by defendants acting under color of law. Since this matter is before us on the ruling granting the motion to dismiss, we are required to treat the allegations of gross misconduct as true for the purpose of review; and they need not be detailed in this opinion. Plaintiffs claim these acts violated their *due*

process rights under the Fourteenth Amendment and give rise to a proper cause of action under Section 1983 of the Act. They further contend that a conspiracy to commit these acts violated their rights to *equal protection of the law* and furnish a proper basis for recovery under Section 1985. By the same reasoning they contend that the allegations charging a failure to prevent the conspiracy sustain their right to recover under Section 1986.

The ultimate issue before us is whether the alleged misconduct on the part of *city police officers* of a state municipality makes a sufficient showing of a violation of the Federal Civil Rights Act.

[fol. 58] This question is not new to this court and has been resolved adversely to plaintiffs' contentions. The most recent decision is that of *Stift* v. *Lynch*, 7 Cir., 267 F. 2d 237 (May 11, 1959). In *Stift*, recovery was sought under the same three sections of the Act as in the instant case. Named as defendants were a sheriff and deputy sheriff, in addition to a Justice of the Peace and the State's Attorney and his assistant. The dismissal of the complaint as to all defendants was affirmed. In sustaining the dismissal as to the sheriff and his deputy, the court said,

> "Under our decisions in *Eaton* v. *Bibb*, 7 Cir., 217 F. 2d 446, *Miles* v. *Armstrong*, 7 Cir., 207 F. 2d 284 and *United States ex rel. Atterbury* v. *Ragen*, 7 Cir., 237 F. 2d 953, we hold the complaint herein did not state a claim under the Federal Civil Rights Act upon which relief could be granted against defendants Lynch and Eichholz." (*Id.* at 240)

Stift distinguishes *Wakat* v. *Harlib*, 7 Cir., 253 F. 2d 59 (1958). See also, *Jennings* v. *Nester*, 7 Cir., 207 F. 2d 153 (1955).

We do not condone the alleged misconduct of defendants, if true, but that is not the question before us. Under the holding in *Stift* v. *Lynch, supra*, and the other decisions of this circuit referred to therein, some of which are cited above, affirmance of the dismissal before us necessarily follows. Plaintiffs are not without their remedy in the state court.

In view of such a determination there is no claim for relief against the City of Chicago.

The order dismissing the complaint is

AFFIRMED.

[fol. 59]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12697

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JAMES MONROE, et al., Plaintiffs-Appellants,

—v.—

FRANK PAPE, et al., Defendants-Appellees.

JUDGMENT—November 23, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the Opinion of this Court filed this day.

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. 712—October Term, 1959

JAMES MONROE, et al., Petitioners,

—v.—

FRANK PAPE, et al.

ORDER ALLOWING CERTIORARI—March 28, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 71 '39

JAMES MONROE, et al.,

Petitioners,

vs.

FRANK PAPE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1959

NO.

JAMES MONROE, et al.,

Petitioners,

vs.

FRANK PAPE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, James and Flossie Monroe, Houston, Robert, Lawrence, Ralph and Jacqueline Stevens and James Monroe, Jr., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on November 23, 1959.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported at 272 F. 2d 365 (1959). The Judgment of the Court of Appeals is reprinted as Appendix B.

The opinion of the District Court, reprinted in Appendix C hereto, has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1959. An out of time petition for rehearing was denied on December 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners, a husband, wife and their six children, stated a cause of action for damages under the Civil Rights Act, R.S. § 1979, when they alleged that thirteen Chicago police officers, acting under color of law, arbitrarily and unreasonably broke into their home and searched it in the night time without a warrant, assaulted and battered them without cause, humiliated them with invidious references to their race, forced two of them from their bed naked, arbitrarily arrested and secretly confined one of them for interrogation and exhibition in line-ups and, finally, released them without ever charging any of them with a crime.

2. Whether a complaint alleging the above acts and a conspiracy by respondents to commit them states a cause of action under R.S. § 1980.

3. Whether a complaint setting forth the above acts and the above conspiracy plus all other elements of the tort defined by R.S. § 1981 states a claim under that section.

4. Whether a municipal corporation can be sued under the Civil Rights Act for damages arising from 14th Amendment due process and equal protection violations by its police officers.

STATUTES INVOLVED

R.S. § 1979 (42 U.S.C.A. § 1983):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Other statutory and constitutional provisions involved are:

28 U.S.C. (1958 ed.) § 1343 [28 U.S.C.A. § 1343]
28 U.S.C. (1958 ed.) § 1331 [28 U.S.C.A. § 1131]
R.S. § 1980 [42 U.S.C.A. § 1985 (3)]
R.S. § 1981 [42 U.S.C.A. §1986]
U.S. Constitution, Amendment 14

These provisions are reprinted in Appendix D to this petition.

STATEMENT

Petitioners brought this action for damages, alleging violation of their Fourteenth Amendment rights under the Civil Rights Act, R.S. §§ 1979, 1980, 1981, in the United States District Court for the Northern District of Illinois[1] against thirteen Chicago police officers and the City of Chicago. On June 5, 1959, the District Court dismissed the complaint for failure to state a claim. Leave to amend the complaint was denied. (Appellants' Appendix 38) On November 23, 1959, the Court of Appeals affirmed, for the same reason.

The complaint asserted:

In the early morning of October 29, 1958, Mr. and Mrs. James Monroe and their six children were at home in their Chicago apartment, asleep in their beds. At 5:45 A.M., Deputy Chief of Detectives Pape and twelve other policemen broke through the front and rear doors of the Monroe dwelling. (Appellants' Appendix 5)

Chief Pape and two others entered the bedroom of Mr. and Mrs. Monroe. They shined flashlights into the faces of the sleeping couple, pointed their pistols and ordered James Monroe out of his bed. Chief Pape cursed Mr. Monroe and threatened to shoot him if he didn't move fast. Mr. Monroe was naked. He left the bedroom at gunpoint. He was forced to stand in the center of his living room naked. (Appellants' Appendix 6-7)

Another officer ordered Mrs. Monroe out of bed. She refused, explaining that she was naked. The officer dragged her out and pushed her into the living room. Chief Pape was questioning Mr. Monroe. He kept calling him "nigger"

[1] Federal jurisdiction was invoked "under 28 U.S.C.A. §§ 1331 and 1343 and 42 U.S.C.A. §§ 1983, 1985 and 1986 and Amendment XIV to the Constitution of the United States." (Appellants' Appendix 1)

and "black boy," and hit him in the belly with his flashlight several times. Meanwhile, the six children were being herded into the living room. One detective kicked four-year-old James Monroe, Jr., who fell to the floor and began to cry. Later, Chief Pape struck Robert Stevens, knocked him down and pushed a third child, Houston, to the floor on top of Robert. (Appellants' Appendix 6-9)

Mrs. Monroe's daughter Jacqueline started for the back door. She wanted to reach a telephone, call a family friend and get help. An officer stepped between Jacqueline and the door, pushed her down and prevented her from leaving. (Appellants' Appendix 9-10)

The police searched every room. They ransacked the closets, throwing all the family's clothing on the floor. They opened and dumped all the drawers in the various pieces of furniture. They ripped open all the mattresses. (Appellants' Appendix 7, 10)

Mr. Monroe was then allowed to dress. His hands were chained together and he was escorted outside. (Appellants' Appendix 10-11)

The police had no warrant for the search or the arrest. (Appellants' Appendix 11-12) The search and seizure was arbitrary and unreasonable. (Appellants' Appendix 18)

Mr. Monroe was taken to police headquarters and imprisoned for about ten hours. Periodically, Mr. Monroe was removed from his cell and placed on exhibition in "line-ups". Between line-ups he was interrogated about a murder. (Appellants' Appendix 13)

Throughout his imprisonment Mr. Monroe was held on "open" charges. No bail was set. He was refused permission to call an attorney or his family. No one informed Mr. Monroe of his rights. (Appellants' Appendix 13-14)

The police had no intention of bringing him promptly to court to answer to a charge of crime. They had not arrested him for this purpose. (Appellants' Appendix 14-15, 17-18) He was being held in an attempt to coerce incriminating statements from him, to exhibit him before other officers and civilians, to punish him, and to "check up" on his background. (Appellants' Appendix 17-18) He was never brought before a judge. (Appellants' Appendix 13-14)

Twenty local courts with jurisdiction to receive criminal complaints and to admit to bail were in session during Mr. Monroe's detention, four of them in the same building where he was held. (Appellants' Appendix 16)

After ten hours, Mr. Monroe was released without charge. No charge ever was placed against him. (Appellants' Appendix 15)

REASONS FOR GRANTING THE WRIT

1. The Seventh Circuit's construction of R.S. § 1979 and the Fourteenth Amendment in this case squarely conflicts with the decision of the Fifth Circuit in *Davis* v. *Turner*, 197 F. 2d 847 (1952).[1a] The conflict is emphasized by the recent decision in *Jackson* v. *Duke*, 259 F. 2d 3 (5th Cir. 1958). Petitioners' complaint would have been sustained in the Fifth Circuit.[2]

2. No Supreme Court case has ever dealt with the applicability of the Civil Rights Act to damage actions against

[1a] R. S. §1979 was, at the time of *Davis* v. *Turner*, found at 8 U.S.C.A. §43, and was so cited by the Fifth Circuit in that opinion.

[2] The decision below also conflicts with the opinion of the Third Circuit in *Hague* v. *C. I. O.*, 101 F. 2d 774 at 781 (1939). This Court subsequently held that the Third Circuit should not have passed on the point decided at the indicated page. 307 U.S. 496, 516-17 (1939).

police officers.[3] Consequently, the lower courts are in conflict and confusion as to the existence, scope and limits of such a remedy for unconstitutional police action:

> "There is considerable doubt and confusion in the application of the Civil Rights Statutes throughout the Circuits."
>
> *Hoffman* v. *Halden*, 268 F. 2d 280, 289 (9th Cir. 1959)

> "We shall not, in the present confused and confusing state of the law, attempt to mark out the general scope and sweep of the civil rights statutes. . . ."
>
> *Deloach* v. *Rogers*, 268 F. 2d 928, 930 (5th Cir. 1959), quoting *McGuire* v. *Todd*, 198 F. 2d 60, 63 (5th Cir. 1952).

The conflicting results reached by federal courts all over the country bear out these statements of the Fifth and Ninth Circuits. *Compare State of Arkansas* v. *Central Surety Corp.*, 102 F. Supp. 444 (W.D. Ark. 1952) *with Mackey* v. *Chandler*, 152 F. Supp. 579 (W.D.S.C. 1957). *Compare Dye* v. *Cox*, 125 F. Supp. 714 (E.D. Va: 1954) *with Jennings* v. *Nester*, 217 F. 2d 153 (7th Cir. 1954). *Compare* the assumption in *Mueller* v. *Powell*, 203 F. 2d 797 (8th Cir. 1953) ("probable cause" is the standard to be employed in determining whether an arrest, detention

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[3] Appendix E to this petition contains a chronological list of the 37 reported civil cases filed under the Act in which police officers, constables, sheriffs, or sheriffs' deputies were parties defendant.

Appendix F contains a list of the seven such civil cases in which this Court has denied a petition for a writ of certiorari.

Appendix G contains a list of the 37 reported civil cases under the Act against police officials, broken down by Circuit, with a brief description of the facts and holding in each case.

and interrogation gives rise to liability under the Act), the reasoning and result in *Refoule* v. *Ellis*, 74 F. Supp. 336 (N.D.Ga. 1947) and the dictum in *Erickson* v. *Hogan*, 94 F. Supp. 459, 460 (S.D.N.Y. 1950) *with* the opinions below and *Mackey* v. *Chandler*, 152 F. Supp. 579 (W.D.S.C. 1957).

Even within the Court of Appeals for the Seventh Circuit, various panels have disagreed. *Compare Gieach* v. *Moynahan*, 207 F. 2d 714 (7th Cir. 1953) (unreasonable arrest, search, detention and coercion of confession creates a cause of action under the Act) *with Jennings* v. *Nester*, 217 F. 2d 153 (7th Cir. 1954) (similar facts, opposite holding), and *with* the opinion below.

As a result of this confusion it is impossible for attorneys to predict whether their cases may properly be filed under the Act. Thus the Act is rendered largely ineffective while costly and time-consuming litigation on threshold issues of jurisdiction and pleading proliferates.[4]

3. The decisions below conflict with *Wolf* v. *Colorado*, 338 U.S. 25 (1949).

The Court of Appeals below held that the Monroe family had no remedy under the Civil Rights Act against the thirteen policemen who committed what that court termed "an unreasonable search and seizure, a series of unjustified batteries and a long, inherently coercive and unjustifiably secret detention" against them. (Court of Appeals opinion,

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[4] Of the 37 reported opinions in civil suits against police officers under the Act, 20 dealt with such preliminary issues and were decided on the pleadings. See Appendix G, cases numbered 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 32, 34, 35, 36, 37. In one of the remaining cases, *Mackey* v. *Chandler*, 152 F. Supp. 579 (W.D.S.C. 1957), the court rendered judgment *n.o.v.* for defendants after a jury verdict for plaintiffs, holding that there was no federal jurisdiction. Apparently the case was not appealed. See *Shepard's Federal Reporter Citations*, Vol. L, No. 1, p. 422 (Jan. 1960).

272 F. 2d at 366, Appendix A, p. 14) The Court of Appeals rejected the claim that "these acts violated . . . *due process* rights under the Fourteenth Amendment and give rise to a proper cause of action under [R.S. § 1979]" (Court of Appeals opinion, 272 F. 2d at 366, Appendix A, p. 14; court's emphasis) The District Court below was even more explicit, quoting and relying on the assertion in *Mackey* v. *Chandler*, 152 F. Supp. 579, 582 (W.D.S.C. 1957) that:

> "The exemption from unreasonable searches and seizures is not . . . an element of due process of law guaranteed by the . . . Amendment against state action. . . ." (District Court opinion, Appendix C, p. 23; Appellees' Appendix 6)

But in *Wolf* v. *Colorado*, 388 U.S. 25, 27-28 (1949), this Court said:

> "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

All the Justices agreed. See 338 U.S. at 39, 40, 41, 47. The Court majority in *Wolf* held that the remedy for unreasonable searches and seizures by local police officers was "private action." 338 U.S. at 30-31[5]

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[5] As early as 1763, the English courts recognized that an unreasonable search and seizure without warrant, whether or not coupled with beatings and imprisonment, was not merely a violation of the common law, but was "contrary to the fundamental principles of the constitution" and "totally subversive of the liberty of the subject." *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153, 1167 (C.P., 1763). Indeed, such conduct by police officers was termed a violation of *Magna Charta*. *Huckle* v. *Money*, 19 How. St. Tr., col. 1404, 1405 (K.B. 1765). In each of these cases, as well as in *Entick* v. *Carrington*, 19 How. St. Tr., col. 1029 (C.P. 1765), it was recognized that an action for damages would lie for such a violation.

The 14th Amendment significance of *Entick* and its companion cases has been noted by this Court. See, *e.g.*, *Frank* v. *Maryland*, 359 U.S. 360, 363 (1959).

The Court of Appeals below did not even mention *Wolf*. So long as the opinions below stand, *Wolf* is a dead letter in the Seventh Circuit.

In recent years, it has been suggested that the *Wolf* doctrine is meaningless:

> ". . . an unreasonable search by a state agent . . . is not such a violation of the Fourteenth Amendment as will invoke operation of that Amendment."
>
> *Mackey* v. *Chandler*, 152 F. Supp. 579, 581 (W.D.S.C. 1957).

> ". . . Wolf's intermediate finding signifies little if anything. . . ."
>
> Kamisar, "*Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts," 43 *Minn. L. Rev.* 1083, 1109 (1959).

> "It would seem that the practical effect of the *Wolf* case is virtually to leave for local determination, unimpeded by federal judicial supervision, the matter of making effective a federal guarantee of a basic constitutional immunity."
>
> Allen, "The Wolf case: Search and Seizure, Federalism, and the Civil Liberties," 45 *Ill. L. Rev.* 1, 9 (1950).

> ". . . (A)lthough recognizing the right, the majority leaves it unenforceable.
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> • • • • •
>
> "The net effect of the *Wolf* decision was the recognition of a *basic* constitutional right without any corresponding remedies, a privilege without substance, an immunity without force."
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> Handler, "The Fourth Amendment, Federalism, and Mr. Justice Frankfurter," 8 *Syracuse L. Rev.* 166, 176, 178 (1957).

This case presents the Court with a striking opportunity to demonstrate that the *Wolf* rule has substance. Justice Jackson and Chief Justice Warren pointed the way in *Irvine* v. *California*, 347 U.S. 128, 137-38 (1954) where they suggested prosecuting the wrongdoing officers under the criminal provisions of the Act.[6] Also see *Stefanelli* v. *Minard*, 342 U.S. 117 (1951), an equity action under R. S. § 1979 which, invoking *Wolf*, sought to enjoin state use of illegally seized evidence:

> "... (U)nder the very section now invoked, we have withheld relief in equity *even when recognizing that comparable facts would create a cause of action for damages.*" 342 U.S. at 122. (Emphasis supplied)

4. Every search and seizure case which has reached this Court has involved a criminal, usually "caught red handed." *Draper* v. *United States*, 358 U.S. 307, 314 (1959). Justices have recognized that the Constitutional safeguard is associated in the public mind with the "dubious characters" who invoke it. *Harris* v. *United States*, 331 U.S. 145, 156 (1947).

This is the first search and seizure case ever to come before this Court in which the rights of *innocent* persons are in question. As such, it presents novel issues of great importance and a significant occasion for the Court to expound the basic meaning of the Constitutional right to freedom from arbitrary police invasions of the home.

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[6] The suggestion in *Irvine* was that the offending officers be prosecuted under 18 U.S.C. § 242. Section 242 is *in pari materia* with R.S. § 1979. *Screws* v. *U. S.*, 325 U.S. 91, 99-100 n. 8 (1945); *Gioch* v. *Moynahan*, 207 F. 2d 714, 717 (7th Cir. 1953); *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, 248 (3rd Cir. 1945).

CONCLUSION.

There is a conflict between the Circuits. The lower courts are in confusion. The leading Supreme Court case has been rejected or ignored below. The constitutional rights of innocent persons have been outrageously violated.

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

FOR THE SEVENTH CIRCUIT

November 23, 1959

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This action was brought in the district court under the Federal Civil Right Act, 42 U.S.C.A. §§ 1983, 1985 and 1986, to recover damages for the alleged misconduct of the defendant Chicago, Illinois police officers. Such misconduct was claimed to be in violation of the rights of plaintiffs under the Fourteenth Amendment to the Constitution of the United States. The City of Chicago, Illinois was joined as a defendant, liability being predicated on the doctrine of *respondeat superior*. The trial court entered an order dismissing the complaint on defendants' motion on the ground that the complaint failed to state a cause of action under the Act, then denied leave to amend; this appeal followed.

The plaintiffs are James Monroe and Flossie Monroe, husband and wife, and their six children represented by their mother, Flossie Monroe, as next friend. The defendants are Frank Pape, Deputy Chief of Detectives of the Chicago Police Department, and twelve unknown police officers assigned to the Detective Bureau designated as John Doe No. 1 to and including No. 12, and the City of Chicago, Illinois. The complaint contains nine counts.

Appendix A

Counts charging violation of 42 U.S.C.A. § 1983 are Counts I, IV and VII. Count I contains the basic factual allegations constituting plaintiffs' cause of action and seeks recovery of damages for James Monroe. Count IV incorporates the facts alleged in Count I and seeks recovery for Flossie Monroe, as does Count VII on behalf of the six Monroe children.

Counts charging violation of 42 U.S.C.A. § 1985 are Counts II, V and VIII, charging a conspiracy of defendants to commit the acts alleged in Count I, again praying damages for James Monroe, Flossie Monroe and the six Monroe children, respectively.

Counts charging violation of 42 U.S.C.A. § 1986 are Counts III, VI and IX, charging failure of each of the defendants to make any effort to prevent the accomplishment of the above conspiracy and seeking recovery for James Monroe, Flossie Monroe and the six Monroe children, respectively.

The complaint alleges an unreasonable search and seizure, a series of unjustified batteries and a long, inherently coercive and unjustifiably secret detention committed against plaintiffs by defendants acting under color of law. Since this matter is before us on the ruling granting the motion to dismiss, we are required to treat the allegations of gross misconduct as true for the purpose of review; and they need not be detailed in this opinion. Plaintiffs claim these acts violated their *due process* rights under the Fourteenth Amendment and give rise to a proper cause of action under Section 1983 of the Act. They further contend that a conspiracy to commit these acts violated their rights to *equal protection of the law* and furnish a proper basis for recovery under

Section 1985. By the same reasoning they contend that the allegations charging a failure to prevent the conspiracy sustain their right to recover under Section 1986.

The ultimate issue before us is whether the alleged misconduct on the part of *city police officers* of a state municipality makes a sufficient showing of a violation of the Federal Civil Rights Act.

This question is not new to this court and has been resolved adversely to plaintiffs' contentions. The most recent decision is that of *Stift* v. *Lynch*, 7 Cir., 267 F. 2d 237 (May 11, 1959). In *Stift*, recovery was sought under the same three sections of the Act as in the instant case. Named as defendants were a sheriff and deputy sheriff, in addition to a Justice of the Peace and the State's Attorney and his assistant. The dismissal of the complaint as to all defendants was affirmed. In sustaining the dismissal as to the sheriff and his deputy, the court said,

> "Under our decisions in *Eaton* v. *Bibb*, 7 Cir., 217 F. 2d 446, *Miles* v. *Armstrong*, 7 Cir., 207 F. 2d 284 and *United States ex rel. Atterbury* v. *Ragen*, 7 Cir., 237 F. 2d 953, we hold the complaint herein did not state a claim under the Federal Civil Rights Act upon which relief could be granted against defendants Lynch and Eichholz." (*Id.* at 240)

Stift distinguishes *Wakat* v. *Harlib*, 7 Cir., 253 F. 2d 59 (1958). See also, *Jennings* v. *Nester*, 7 Cir., 207 [*sic.* 217] F. 2d 153 (1955) [*sic.* (1954)].

We do not condone the alleged misconduct of defendants, if true, but that is not the question before us. Under the holding in *Stift* v. *Lynch*, *supra*, and the other decisions of this circuit referred to therein, some of which

are cited above, affirmance of the dismissal before us necessarily follows. Plaintiffs are not without their remedy in the state court.

In view of such a determination there is no claim for relief against the City of Chicago.

The order dismissing the complaint is

AFFIRMED.

APPENDIX B

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, November 23, 1959

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

(Caption)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Opinion of this Court filed this day.

APPENDIX C

Opinion of the United States District Court, Northern District of Illinois, Eastern Division

Transcript of Proceedings had at the hearing of the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, sitting in his courtroom in the United States Court House at Chicago, Illinois on Friday, June 5, 1959, at 10:00 o'clock a. m.

Present:

Donald Page Moore, Esq. and Ernst Liebman, Esq., appeared on behalf of plaintiffs;

Hon. John C. Melaniphy, Corporation Counsel, City of Chicago, by Edward R. Hartigan, Esq., Asst. Corporation Counsel, appeared on behalf of defendants.

The Clerk: 59 C 329, James Monroe *vs.* Frank Pape, et al., Decision on Defendant's Motion to Dismiss Complaint.

The Court: I had you come in here gentlemen, because I thought I ought to give you some reasons for deciding this motion which is important.

This action, as we know, is based upon the Civil Rights Act, 42 U. S. C., Sections 1983, 1985 and 1986, and the Fourteenth Amendment of the United States Constitution.

The plaintiffs are James Monroe and Flossie Monroe, husband and wife, and six children represented by their mother, Flossie Monroe, as next friend.

Appendix C

The defendants are Frank Pape of the City of Chicago Police Department, twelve unknown police officers designated as John Doe No. 1 to and including No. 12, and the City of Chicago.

Count 1 of the complaint charges that on or about October 29, 1958, at about 5:45 a. m., while the plaintiffs were asleep in their bed, the defendants broke into the plaintiffs' apartment from both the front and the rear doors and according to the complaint the following events occurred:

Frank Pape and John Doe No. 1 and 2 entered the bedroom of James and Flossie Monroe, flashed their—shall we call them flashlights?

Mr. Moore: Yes, your Honor.

The Court: —upon them and pointed pistols at them and commanded James Monroe to walk into the living room while he was naked.

At this time Frank Pape allegedly cursed James Monroe and threatened to shoot him if he did not obey the various commands of the defendant. Thereupon James Monroe was forced to stand naked in his living room and his children and step-children, also plaintiffs in this case, were ordered into the living room and forced to remain in their night clothes.

During the time of these alleged occurrences, the defendant John Doe No. 1 went into the bedroom closet, seized the clothing in the closet and threw each article on the floor. At the same time John Doe No. 2 ordered Flossie Monroe from her bed while she was naked, but according to the complaint she was able to snatch a blanket to cover her nakedness. She was then pushed and escorted into the living room and forced to stand beside her husband James Monroe.

The complaint goes on to allege that while Flossie Monroe was being pushed into the living room. the defendant Frank Pape repeatedly hit and struck James Monroe and jabbed a flashlight into his stomach and referred to him as a "nigger" and "black boy".

Count 1 also alleges that the defendant John Doe No. 3 kicked the plaintiff James Monroe, Jr., a four year old child, and caused him to fall to the floor crying. Then Frank Pape struck the plaintiff Robert Stevens and knocked him down. The complaint goes on to allege that Frank Pape pushed and shoved the plaintiff Houston Stevens so that he fell across Robert Stevens. When Frank Pape struck Robert Stevens and pushed Houston Stevens, the plaintiff Jacqueline Stevens attempted to leave the apartment by the back door in order to reach a telephone, and John Doe No. 5 blocked her access to the back door and pushed her to the floor.

Count 1 further alleges that the defendants searched each and every room of the apartment, emptied all the drawers in the apartment and dumped their contents on the floor.

The defendants also ripped and cut mattress coverings of the beds and threw the contents of all closets on the floor. Thereafter the defendants provided James Monroe with clothing, handcuffed him and escorted him to a parked automobile. The defendants told Flossie Monroe that James Monroe was being taken to a police station for questioning.

Count 1 alleges that these acts were committed by the individual defendants, none of whom had a warrant for the search of the apartment or a warrant for the arrest of James Monroe.

Appendix C

Count 1 also alleges that after James Monroe was escorted to the automobile, four defendants, including Frank Pape, drove the plaintiff to the corner of Roosevelt Road and Homan Avenue in Chicago and parked the automobile and it remained there for approximately 30 minutes. These defendants then transported James Monroe to the Central Police Headquarters of the Chicago Police Department.

After his arrival at the Central Headquarters at or about 6:00 o'clock in the morning, James Monroe was imprisoned approximately ten hours and was from time to time placed upon exhibition in a so-called "line-up".

In addition, Count 1 alleges that during the incarceration, James Monroe was subjected to intermittent interrogation concerning the alleged murder of one Peter Saisi.

The complaint asserts that during the incarceration, James Monroe was never brought before a judge, court or magistrate; was never charged with a crime; was never allowed to make bail or post bond; was not permitted to contact his attorney, friends or family; was not informed of any formal charges placed against him; was not informed of his privilege against self-incrimination, and was not informed of his right to counsel.

At the conclusion of the 10 hour period of incarceration, James Monroe was released from custody by the defendants without having been charged with any crime.

Count 2 of the complaint alleges that prior to the acts alleged in Count 1, the individual defendants entered into a conspiracy with each other for the purpose of defeating the due course of justice and to deny James Monroe the equal protection of the law.

Appendix C

Count 2 asserts that the individual defendants deprived James Monroe of his civil and constitutional rights and violated Section 1985 of the Civil Rights Act by conspiring to commit the acts alleged in Count 1 of the complaint.

Count 3 alleges that the defendants had knowledge of the conspiracy alleged in Count 2 and the power to prevent the conspiracy but failed to do so. This failure is asserted to be a violation of Section 1986 of the Civil Rights Act.

In Count 4 of the complaint, the plaintiff Flossie Monroe seeks damages for the same acts alleged by James Monroe in Count 1 which were committed against her by the defendants.

She alleges in Count 5 that the defendants violated Section 1985 of the Civil Rights Act when they committed the conspiracy alleged by James Monroe in Count 2.

In Count 6 she alleges that the defendants had knowledge of the conspiracy and failed to prevent its commission and therefore violated Section 1986 of the Civil Rights Act.

In Counts 7, 8 and 9, respectively, the minor plaintiffs, Houston Stevens, Robert Stevens, Lawrence Stevens, Jacqueline Stevens and James Monroe, Jr., allege that the defendants committed the same acts alleged by James Monroe in Count 1, the same conspiracy alleged by James Monroe in Count 2, and the same failure of defendants to prevent the conspiracy alleged by James Monroe in Count 3.

The defendants Frank Pape and the City of Chicago have moved to dismiss the complaint because it fails to state a claim upon which relief may be granted.

Now as to Frank Pope, there are eight plaintiffs in this action, each of whom has alleged a claim for relief based upon the same facts alleged by Janies Monroe in Count 1 of the complaint. Therefore, I shall not treat each plaintiff separately since the factual allegations are lengthy. I shall characterize or describe the acts of the defendants in the same manner in which the plaintiff has characterized them.

Dealing with the subject of search and seizure, Count 1 of the complaint alleges that the defendants Pape and the John Doe police officers broke and entered into the plaintiff's family apartment at 5:45 a. m. on October 29, 1958; that the defendants had no search warrant and that the search was arbitrary and unreasonable. The plaintiffs contend that this search and seizure is a violation of 42 United States Code, Section 1983.

The defendant argues that the plaintiffs have failed to allege that any evidence which might be used against the plaintiff was obtained by the illegal search and that therefore 42 U. S. C., Section 1983, was not violated.

The Supreme Court has recently said that "the security of one's privacy against arbitrary intrusion by the police is fundamental to a free society and as such protected by the Fourteenth Amendment." *Frank* v. *Maryland* decided by the Supreme Court on May 4, 1959; *Wolf* v. *Colorado*, 338 U. S. 25, at 27, decided in 1948.

Although the Fourteenth Amendment prohibits unreasonable searches by state officers, there is a limitation as to how far the federal government can and should go in supervising activities of state and local law enforcement agencies. See *Wolf* v. *Colorado* to which I have previously referred; an article by Allen on the *Wolf* Case, Search and Seizure, Federalism and the Civil Liberties, 45 Ill. Law Review 1, written and published in 1950.

This reasoned limitation was applied in *Mackey* v. *Chandler*, 152 Fed. Supp. 579, Western District of South Carolina, 1957. The *Mackey* case held that the Civil Rights Act did not provide a cause of action against state officers who unreasonably searched an individual's home. The Court stated:

> "The exemption from unreasonable searches and seizures is not one of the privileges and immunities of the citizens of the United States which the Fourteenth Amendment forbids the state to abridge, nor is it an element of due process of law guaranteed by the latter amendment against state action." That at page 582 of that opinion.

The Court in the *Mackey* case relied heavily upon the case of *Jennings* v. *Nester*, 217 F. 2d 153 decided by our Circuit in 1954 which involved an allegation of unlawful search of the person. Although the Court in the *Jennings* case did not deal expressly with this allegation, the Court held that the complaint did not state a claim for relief under the Civil Rights Act. In reaching this conclusion, the Court asserted that the Civil Rights Act was not designed to discipline state police officers and that the common law provides adequate actions for damages against errant police officers.

Although the *Mackey* case has been criticized, see Comment, Civil Rights Act Section 1983 and Illegal Search by State Officers, 10 Sanford Law Review 335 published in 1958, and the actions of the defendants, if true, may not be as we would like our police officers to behave,—and I don't know whether they are true or not—the search of the plaintiffs' apartment without a search warrant is not a violation of the Civil Rights Act, Section 1983. The only two cases which have been presented with this issue have concurred in that result. *Jennings* v. *Nester*, to which I have previously alluded, and the *Mackey* case, also referred to.

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Now as to the brutality, alleged brutality, Count 1 of the complaint alleges that Frank Pape committed batteries on James Monroe, Robert Stevens and Houston Stevens. In addition, Count 4 alleges that batteries were committed in Pape's presence by his fellow officers upon Flossie Monroe, Jacqueline Stevens and James Monroe, Jr. The plaintiffs argue that an intentional assault by an individual acting under state authority is a violation of the Civil Rights Act.

The defendant argues that an assault does not violate an individual's civil rights. The defendant is correct in this contention. An assault, without more, does not constitute a violation of the Civil Rights Act. *Screws* v. *United States*, 325 U. S. 91. In that case decided in 1945, the Court stated:

> "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected by or secured by the Constitution or laws of the United States." That from page 108 of that opinion.

In *Miles* v. *Armstrong*, 207 F. 2d 284, decided by our circuit in 1953, it was held that an aggravated assault did not violate the privileges and immunities clause of the Fourteenth Amendment. The Court in that case at page 187 said:

> "The injuries he asserts he has suffered are, in essence, an aggravated assault upon his person and wanton destruction of his property—grievous injuries surely. But they do not constitute privileges and immunities incident to United States citizenship; they are rather such that the perpetrators are punishable under state law where reparation may be obtained."

Accord: *United States ex rel. Atterbury* v. *Ragen*, 237 F. 2d 953, again decided by our circuit in 1956; *Knight* v. *Bibb*, 250 F. 2d 283, decided by the Seventh Circuit in 1957.

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It is true that the *Miles* case was concerned with Section 1985 rather than Section 1983 upon which the plaintiffs rely in the case at bar, and it is equally true that Section 1983 is broader than Section 1985 in that 1983 embraces violations of due process and such violations are not embraced by 1985. However, I have been unable to find any case which holds that an assault unaccompanied by other circumstances perpetrated by state officers constitutes a violation of due process rights.

There is nothing more than an allegation of assault and battery stated by the plaintiffs in the case at bar. There is no allegation that the assault and battery on any of the plaintiffs was designed to elicit "information and/or confessions." See *Geach* v. *Moynahan*, 207 F. 2d 714, Seventh Circuit, 1953.

I am of the opinion, therefore, that the brutality allegations of the plaintiff's complaint do not state a claim upon which relief may be granted under the Civil Rights Act.

Now as to the so-called incommunicado detention, Count 1 alleges among other things that James Monroe was arrested without a warrant and held for 10 hours for interrogation and was exhibited in police line-ups. In addition Count 1 alleges that James Monroe was never charged with any crime and was denied the right to bail and the advice of counsel.

The plaintiff James Monroe argues that such incommunicado detention was a denial of due process of law in violation of the Civil Rights Act.

The defendant asserts that false arrest and false imprisonment are not violations of the Civil Rights Act.

In the recents case of *Stift* v. *Lynch* decided by the Seventh Circuit on May 11, 1959, not yet in the books, an

action was brought under the Civil Rights Act against a sheriff and his deputy for false arrest, for false imprisonment, and the alleged failure to charge the plaintiffs therein with a crime until after the expiration of about two hours.

The Court held that these acts did not violate the Civil Rights Act. Accord: *Yglesias* v. *Gulfstream Park Racing Association, Inc.*, 201 F. 2d 817 decided by the Fifth Circuit in 1953; *Dinneen* v. *Williams*, 219 F. 2d 428, decided by the Ninth Circuit in 1955.

We come now to a discussion of the conspiracy allegation. In addition to the charge that the defendants violated Section 1983 of the Civil Rights Act, the complaint asserts that a conspiracy existed between the defendants pursuant to which they illegally searched the plaintiff's apartment, assaulted various plaintiffs, seized James Monroe and imprisoned him for ten hours. The plaintiffs assert that this conspiracy was a deprivation of equal protection and in violation of Section 1985.

The defendant contends that the complaint fails to allege wherein the plaintiff was deprived of equal protection.

It must be pointed out that Section 1983 of the Civil Rights Act provides a claim for relief for a deprivation of due process, and Section 1985 provides relief for deprivation of equal protection.

Section 1983 does not mention conspiracy but Section 1985 does; therefore, the Civil Rights Act provides a claim for conspiracy to deny equal protection but not for a conspiracy to deny due process. See *Jennings* v. *Nester*, to which I have previously alluded; *Ortega* v. *Rogers*, 216 F. 2d 561, a case which I had something to do with in the trial court; *Mitchell* v. *Greenough*, 100 F. 2d 184, decided by the Ninth Circuit in 1938.

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The conclusory allegations of the complaint do not embody a claim for relief. Indeed, it has been held that where the complaint characterizes the acts of the defendants as malicious, conspiratorial and done for the purpose of depriving plaintiffs of their constitutional rights, such allegations must be disregarded on a motion to dismiss. *McGuire* v. *Todd*, 198 F. 2d 60, decided by the Fifth Circuit in 1952; *Dunn* v. *Gazzola*, 216 F. 2d 709, a First Circuit case decided in 1954, and the *Ortega* case to which I have previously referred.

In the case at bar, the plaintiffs have made no factual allegations which support the assertion that the plaintiffs were denied equal protection of the law. As the Court stated in the *Jennings* v. *Nester* case at page 154:

> "The complaint clearly does not state a cause of action for a denial of equal protection. Although it alleges improper acts on the part of the defendants, there is nothing to indicate that every citizen of Illinois is not potentially subject to the same treatment."

The plaintiffs rely upon the case of *Wakat* v. *Harlib*, 253 F. 2d 59, decided by our circuit in 1958, in support of their contention that the defendants violated Section 1985.

Although the *Wakat* case contains language which indicates that Section 1985 may be violated when state officers discriminate against an individual rather than a class, the language has been held to be unnecessary and dicta. *Stift* v. *Lynch* to which I have previously referred.

In the *Wakat* case the plaintiff was described as a well known criminal and as such was denied equal protection by a police regulation having the force of law. Since the plaintiffs in the case at bar have not alleged that they were treated in a manner by the defendants which differs from the treatment others may suffer, they have not stated a claim upon which relief may be granted under Section 1985.

Now as to the alleged failure to prevent conspiracy, the plaintiffs allege that Pape and the John Doe police officers failed to prevent the alleged conspiracy which violated Section 1985 of the Civil Rights Act, and therefore violated Section 1986 of the Civil Rights Act.

Section 1986 provides in pertinent part that:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action."

The plaintiffs assert that if the conspiracy allegations state a claim for relief under Section 1985, the allegations with respect to the failure to prevent the conspiracy also state a claim for relief.

Since the conspiracy allegations do not state a claim upon which relief may be granted, the allegations of failure to prevent a conspiracy are similarly defective.

Now as to the City of Chicago, the defendant City of Chicago bases its motion to dismiss upon the ground that a municipal corporation is not liable for the wrongful acts of its police and that this immunity extends to a Civil Rights Act.

The plaintiffs argue, inter alia, that Congress did not intend that the Civil Rights Act should include municipal immunity; that the word "person" as used in the Civil Rights Act was intended to include a municipal corporation as well as any other person; that the need for uni-

formity throughout the various states dictates that municipal corporations be held liable under the Civil Rights Act; and that in some cases relief has been granted against municipal corporations in actions under the Civil Rights Act.

Although it has been held that municipal corporations are not liable under the Civil Rights Act, *Agnew* v. *City of Compton*, 239 F. 2d 226, decided by the Ninth Circuit in 1956; *Charlton* v. *City of Hialeah*, 188 F. 2d 421, decided by the Fifth Circuit in 1951, this immunity for the municipality has been drawn from the common law of the state in which the action arose.

In Illinois, the recent decision of *Molitor* v. *Kaneland Community Unit District 302*, Law Week 27-2609, June 2, 1959, strongly indicates that the doctrine of municipal immunity has been abandoned.

The *Molitor* case involved an action by a pupil against a school district for injuries sustained by the pupil while riding in a school bus. The Supreme Court of Illinois decided that although a school district had heretofore been protected from liability for the negligent acts of its agents, the doctrine of immunity which gave such a protection was no longer sound or just under modern conditions.

It should be noted that the *Molitor* case did not involve a municipal corporation.

In the case at bar, it is unnecessary to apply or interpret the *Molitor* decision since the liability of the City of Chicago is based upon the doctrine of *respondeat superior*, and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself.

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Since the plaintiffs have not alleged any facts which support their conclusory allegations that the defendants violated the Civil Rights Act, the defendants' motion to dismiss, Mr. Clerk, will be allowed, and the complaint will be dismissed.

Mr. Moore: If the Court please, may we have leave to file an amended complaint?

The Court: No, I think I will let that order stand. I went into this very thoroughly. You have got a big, long complaint and we spent a lot of time on it, and I don't— moreover, counsel for the defendant has gone.

I will let my order stand as it is.

Mr. Moore: Thank you, your Honor.

APPENDIX D

Additional Statutes Involved

28 U.S.C. § 1343 (28 U.S.C.A. § 1343):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

R.S. § 1980 (42 U.S.C.A. § 1985) (with relevant portions italicized):

• • •

(3) *If two or more persons in any State* or Territory *conspire* or go in disguise on the highway or **on the premises of another**, *for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws*, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any

citizen in person on property on account of such support or advocacy; *in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property,* or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.*

R.S. § 1981 (42 U.S.C.A. § 1986):

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Appendix D

28 U.S.C. (1958 ed.) § 1331 (28 U.S.C.A. § 1331):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Amendment 14, Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

Chronological List of 37 Reported Civil Suits against Police Officers under Civil Rights Act.

Hague v. *C.I.O.*, 307 U.S. 496 (1939), Modifying and aff'g 101 F. 2d 774 (3d Cir. 1939) and 25 F. Supp. 127 (D.N.J. 1938).

Gladstone v. *Galton*, 145 F. 2d 742 (9th Cir. 1944).

Picking v. *Pennsylvania R. Co.*, 151 F. 2d 240 (3d Cir. 1945); reh. den., 152 F. 2d 753 (1945) subsequent decision, 160 F. 2d 106 (1947); cert. den., 332 U.S. 776 (1947); reh. den., 332 U.S. 821 (1947).

Refoule v. *Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947).

McShane v. *Moldovan*, 172 F. 2d 1016 (6th Cir. 1949); subsequent decision, 181 F. 2d 189 (1950).

Valle v. *Stengel*, 176 F. 2d 697 (3d Cir. 1949); rev'g 75 F. Supp. 543 (D.N.J. 1948).

Watkins v. *Oak Lawn Jockey Club*, 86 F. Supp. 1006 (W.D. Ark. 1949); aff'd 183 F. 2d 440 (8th Cir. 1950).

Robeson v. *Fanelli*, 94 F. Supp. 62 (S.D.N.Y. 1950); prior opinion, 91 F. Supp. 251 (1950).

Erickson v. *Hogan*, 94 F. Supp. 459 (S.D.N.Y. 1950).

Stefanelli v. *Minard*, 342 U.S. 117 (1951); Aff'g 184 F. 2d 575 (3d Cir. 1950).

McGuire v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951).

Davis v. *Turner*, 197 F. 2d 847 (5th Cir. 1952).

State of Arkansas v. *Central Surety Corp.*, 102 F. Supp. 444 (W.D. Ark. 1952).

Yglesias v. *Gulfstream Park Racing Ass'n*, 201 F. 2d 817 (5th Cir. 1953); cert. den. 345 U.S. 993 (1953).

Mueller v. *Powell*, 203 F. 2d 797 (8th Cir. 1953); aff'g 105 F. Supp. 344 (W.D. Mo. 1952).

Appendix E

Gould v. *Maguahan*, 207 F. 2d 714 (7th Cir. 1953).

Jennings v. *Nester*, 217 F. 2d 153 (7th Cir. 1954); cert. den. 349 U.S. 958 (1955).

Dye v. *Cox*, 125 F. Supp. 714 (E.D. Va. 1954).

Duncan v. *Williams*, 219 F. 2d 428 (9th Cir. 1955).

Lewis v. *Brautigam*, 227 F. 2d 124 (5th Cir. 1955).

McCollum v. *Mayfield*, 130 F. Supp. 112 (N.D. Calif. 1955).

Thompson v. *Baker*, 133 F. Supp. 247 (W.D. Ark. 1955).

Davis v. *Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955).

Agnew v. *City of Compton*, 239 F. 2d 226 (9th Cir. 1956); cert. den. 353 U.S. 959 (1957).

Pollack v. *Newark*, 147 F. Supp. 35 (D.N.J. 1956); aff'd, 248 F. 2d 543 (3d Cir. 1957); cert. den., 355 U.S. 964 (1958).

Mackey v. *Chandler*, 152 F. Supp. 579 (W.D.S.C. 1957).

Coleman v. *Johnson*, 247 F. 2d 273 (7th Cir. 1957).

Simmons v. *Whitaker*, 252 F. 2d 224 (5th Cir. 1958).

Wakat v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958).

Carey v. *Ragan*, 257 F. 2d 449 (5th Cir. 1958); cert. den., 358 U.S. 851 (1958); reh. den., 358 U.S. 914 (1958).

Hampton v. *DeBlaay*, 258 F. 2d 790 (6th Cir. 1958); cert. den. 358 U.S. 850 (1958); reh. den. 359 U.S. 922 (1959).

Jackson v. *Duke*, 259 F. 2d 3 (5th Cir. 1958).

Watson v. *Devlin*, 167 F. Supp. 638 (E.D. Mich. 1958); aff'd 268 F. 2d 211 (6th Cir. 1959).

Stiff v. *Lynch*, 267 F. 2d 237 (7th Cir. 1959).

Deloach v. *Rogers*, 268 F. 2d 928 (5th Cir. 1959).

Haifetz v. *Rizzo*, 171 F. Supp. 654 (E.D. Pa. 1959).

Egan v. *Aurora*, 174 F. Supp. 794 (N.D. Ill. 1959).

APPENDIX F

Civil Cases Under the Civil Rights Act Against Police Officers In Which Certiorari Has Been Denied.

Opinion Below	*Certiorari Denied*
Hampton v. *DeBlaay*, 258 F. 2d 790 (6th Cir. 1958).	358 U.S. 850 (1958) *reh. den.* 359 U.S. 922 (1959).
Curry v. *Ragan*, 257 F. 2d 449 (5th Cir. 1958).	358 U.S. 851 (1958) *reh. den.* 358 U.S. 914 (1958).
Pollack v. *Newark*, 147 F. Supp. 35 (D.N.J. 1956) *aff'd*, 248 F. 2d 543 (3d Cir. 1957).	355 U.S. 964 (1958).
Agnew v. *City of Compton*, 239 F. 2d 226 (9th Cir. 1956).	353 U.S. 959 (1957).
Jennings v. *Nester*, 217 F. 2d 153 (7th Cir. 1954).	349 U.S. 958 (1955).
Yglesias v. *Gulfstream Park Racing Ass'n.*, 201 F. 2d 817 (7th Cir. 1953).	345 U.S. 993 (1953).
Picking v. *Pennsylvania R. Co.*, 151 F. 2d 240, *reh. den.*, 152 F. 2d 753 (3d Cir. 1945) *subsequent decision*, 160 F. 2d 106 (3d Cir. 1947).	332 U.S. 776 (1947) *reh. den.* 332 U.S. 821 (1947).

APPENDIX G

Reported Civil Cases Under the Civil Rights Act Against Police Officers With Description of Facts and Holdings, by Circuits.

SUPREME COURT

1. *Hague* v. *C. I. O.*, 307 U.S. 496 (1939) modifying and aff'g 101 F. 2d 774 (3d Cir. 1939) and 25 F. Supp. 127 (D.N.J. 1938)	Suit to enjoin, *inter alia*, arrests, confiscation of pamphlets and ejection of individuals from city, committed by local police, acting under unconstitutional ordinance, for purpose of depriving plaintiffs of speech and assembly rights. Injunction issued.
2. *Stefanelli* v. *Minard*, 342 U.S. 117 (1951) aff'g 184 F. 2d 575 (3d Cir. 1950)	Suit to enjoin use in State criminal proceeding of evidence illegally seized by local police. Relief denied in exercise of "equitable discretion."

FIRST CIRCUIT

(No cases.)

SECOND CIRCUIT

3. *Erickson* v. *Hogan*, 94 F. Supp. 459 (S.D.N.Y. 1950)	Suit to enjoin use in State criminal proceeding of evidence illegally seized by local police. Relief denied. *Dictum* that damage action can be maintained, and leave granted to amend complaint accordingly.
4. *Robeson* v. *Fanelli*, 94 F. Supp. 62 (S.D.N.Y. 1950) prior opinion, 91 F. Supp. 251 (1950)	Damage complaint alleging, *inter alia*, conspiracy, assaults, and failure to prevent rioting at public political meeting. Complaint upheld.

THIRD CIRCUIT

5. *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (1945) *reh. den.*, 152 F. 2d 753 (1945) subsequent decision, 160 F. 2d 106 (1947) *cert. den.*, 332 U.S. 776 (1947) *reh. den.*, 332 U.S. 821 (1947)	Damage complaint alleging, *inter al* false arrest, imprisonment and physi mistreatment, *semble*. See 151 F. 2 at 249. Complaint upheld. Plaintif appeared *pro se*.
6. *Valle* v. *Stengel*, 176 F. 2d 697 (1949) *rev'g* 75 F. Supp. 543, (D.N.J. 1948)	Complaint for damages and injunctio alleging *inter alia*, false arrest by pol chief in aid of private swimming poo illegal (under state law) segregatio policy. Complaint upheld.
7. *Pollack* v. *Newark*, 147 F. Supp. 35 (D.N.J. 1956) *aff'd*, 248 F. 2d 543 (3d Cir. 1957) *cert. den.*, 355 U.S. 964 (1958)	Suit for damages alleging plaintiff's a bitrary arrest by police. Complaint an affidavit of plaintiff (who appeared *pr se*) fail to make out, even *prima faci* a false arrest. Summary judgment fo defendant. Court assumes that arre without probable cause gives action u der Act.
8. *Haifetz* v. *Rizzo*, 171 F. Supp. 654 (E.D. Pa. 1959)	Suit to enjoin "mass raids" on coffe shop and for damages for ensuing arb trary arrests. Preliminary injunctio denied. Decision on "serious and sub stantial questions" raised by action, de ferred to hearing on merits.

Appendix G

FOURTH CIRCUIT

9.	
Doe v. *Cox*, 125 F. Supp. 714 (E.D.Va. 1954)	Damage complaint alleging false arrest, overnight secret detention plus beating. On motion to dismiss, *held* that no cause of action stated because plaintiff failed to allege specific intent to deprive him of his constitutional rights. Leave given plaintiff to amend his complaint accordingly.
10.	
Macken v. *Chandler*, 152 F. Supp. 579 (W. D. S. C. 1957)	Damage action alleging unreasonable search and seizure, secret detention and brutality. Jury verdict for plaintiffs. Judgment *n.o.v.* for defendants on grounds that allegations and proof fail to make out a federal cause of action.
11.	
McGuire v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951)	Suit to enjoin use in state criminal proceeding of wiretap evidence obtained by local police. Relief denied in exercise of "equitable discretion." Alternatively, no cause of action pleaded because no *constitutional* violation alleged, citing *Olmstead* v. *U. S.*, 277 U.S. 438 (1928).

FIFTH CIRCUIT

12.	
Davis v. *Turner*, 197 F. 2d 847 (1952)	Damage action alleging unreasonable search and seizure, battery and secret detention. Complaint upheld.
13.	
Valesio v. *Gulfstream Park Racing Ass'n.*, 201 F. 2d 817 (1953) *cert. den.* 345 U.S. 993 (1953)	Damage action alleging false imprisonment followed by improper trial on criminal charges. Complaint dismissed.

Appendix G

FIFTH CIRCUIT (Continued)

14. *Lewis* v. *Brautigam*, 227 F. 2d 124 (1955)	Damage complaint alleging, *inter al* coercion of confession by psychologic pressures, threats and intimidatio Complaint upheld.
15. *Simmons* v. *Whitaker*, 252 F. 2d 224 (1958)	Damage complaint alleging threats sheriff to arrest plaintiff in the cour of sheriff's successful effort to fo plaintiff to pay large hospital bills a though she was not liable for them. I rected verdict for sheriff affirmed. N proof sheriff acted under color of la No proof sheriff acted with specific tent to deny constitutional rights.
16. *Jackson* v. *Duke*, 259 F. 2d 3 (1958)	Damage action based on brutal beat and false arrest. Judgment on jury v diet of $5,000.00 affirmed.
17. *Curry* v. *Ragan*, 257 F. 2d 449 (1958) *cert. den.*, 358 U.S. 851 (1958) *reh. den.*, 358 U.S. 914 (1958)	Damage complaint, filed by lay ma se alleging malicious institution of fo ble entry and detainer action by priva citizen. Three defendant policemen a ing pursuant to court order, assisted ejecting plaintiff from his home. Co plaint dismissed.
18. *Deloach* v. *Rogers*, 268 F. 2d 928 (1959)	Damage complaint alleging false arre and beating by officers acting pursua to "peace warrant." Complaint di missed.
19. *Refoule* v. *Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947)	Suit to enjoin repeated false arrests fo lowed by secret police interrogations o plaintiff. Injunction issued.

Appendix G

SIXTH CIRCUIT

20. *McShane* v. *Moldovan*, 172 F. 2d 1016 (1949) *subsequent decision*, 181 F. 2d 189 (1950)	Damage complaint alleging false imprisonment and conspiracy to "frame" plaintiff on a state criminal charge. Complaint upheld.
21. *Watson* v. *Derbin*, 167 F. Supp. 638 (E.D. Mich. 1958) *aff'd* 268 F. 2d 211 (1959)	Damage complaint alleging long secret detention plus "malicious prosecution" and "false arrest," filed by state convict, *pro se*. Held, complaint frivolous, leave to proceed in *forma pauperis* denied.
22. *Hampton* v. *DeBlaay*, 258 F. 2d 730 (1958) *cert. den.*, 358 U.S. 850 (1958) *reh. den.*, 359 U.S. 922 (1959)	Damage complaint alleging false arrest and imprisonment, filed by convict, *pro se*. Summary judgment for defendants affirmed. Plaintiff's admissions in prior State Court proceedings negate existence of any cause of action or issue of fact.

SEVENTH CIRCUIT

23. *Gindi* v. *Monnahan*, 207 F. 2d 714 (1953)	Damage complaint alleging unreasonable search, secret detention, beating to obtain confession filed by convict, *pro se*. Complaint upheld.
24. *Simmons* v. *Nestor*, 217 F. 2d 153 (1954) *cert. den.* 349 U.S. 958 (1955).	Damage complaint alleging unreasonable search, secret detention, beating to obtain confession filed by convict, *pro se*. Complaint dismissed.

Appendix G

SEVENTH CIRCUIT (Continued)

25. *Coleman* v. *Johnson*, 247 F. 2d 273 (1957)	Damage complaint alleging three day secret detention of [illegible] suffering from bullet wounds, refusal to furnish medical care, malicious prosecution. Complaint upheld.
26. *Wakat* v. *Harlib*, 25[illegible] F. 2d 59 (1958)	Damage action based on six day secret detention, beating to obtain confession of plaintiff, a "well-known criminal," and conspiracy to accomplish the secret. Judgment on jury verdict of $15,000 affirmed.
27. *Stift* v. *Lynch*, 267 F. 2d 237 (1959)	Damage complaint alleging false arrest and two hour (p. 238 n. 1) secret detention. Complaint dismissed.
28. *Davis* v. *Johnson*, 138 F. Supp. 572 (N.D.Ill. 1955)	Damage complaint alleging battery with a pistol followed by fatal shooting. Complaint upheld.
29. *Egan* v. *Aurora*, 174 F. Supp. 794 (N.D.Ill. 1959)	Damage complaint alleging false arrest of political speaker. Complaint dismissed.

EIGHTH CIRCUIT

30. *Mueller* v. *Powell*, 203 F. 2d 797 (1953) *aff'g* 105 F. Supp. 344 (W.D. Mo. 1952)	Damage action based on alleged false arrest and all night secret detention for interrogation. Judgment on merits for defendants after bench trial, affirmed. Defendants had "probable cause" to arrest and question plaintiff.
31. *State of Arkansas* v. *Central Surety Corp.*, 102 F. Supp. 444 (W.D. Ark. 1952)	Damage complaint alleging false arrest and repeated batteries. Complaint upheld. Summary judgment for defendants denied.

Appendix G

EIGHTH CIRCUIT (Continued)

32.

Thompson v. *Baker*, 133 F. Supp. 247 (W.D. Ark. 1955)

Action for injunction, declaratory judgment and damages alleging improper (under state law) issuance and service of garnishment writs. Complaint dismissed.

33.

Watkins v. *Oak Lawn Jockey Club*, 86 F. Supp. 1006 (W.D. Ark. 1949) *aff'd* 183 F. 2d 440 (1950)

Damage action based on false arrest by deputy sheriff, employed part-time by race track. Held, (after trial on merits followed by "hung" jury)—Directed verdict for defendants.

NINTH CIRCUIT

34.

Galbraith v. *Galbon*, 145 F. 2d 742 (1944)

Complaint for damages and injunction, alleging arrests, searches and prosecutions of plaintiff pursuant to allegedly unconstitutional ordinance. Complaint dismissed. Ordinance is constitutional.

35.

Dorsey v. *Williams*, 219 F. 2d 428 (1955)

Damage complaint alleging false arrest and 20 hour secret detention. Complaint dismissed.

36.

Lopez v. *City of Compton*, 239 F. 2d 226 (1956) *cert. den.* 353 U.S. 959 (1957)

Damage complaint alleging false arrest. Complaint dismissed.

37.

McCollum v. *Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955)

Damage complaint alleging that plaintiff, jailed pending criminal trial, was forced to do menial labor, suffered injuries in the course of such labor, and was denied medical care. Complaint upheld.

TENTH CIRCUIT

(No cases.)

DISTRICT OF COLUMBIA CIRCUIT

(No cases.)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 218 21

JAMES MONROE ET AL.,

Petitioners,

vs.

FRANK PAPE ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 712.

JAMES MONROE ET AL.,

Petitioners,

vs.

FRANK PAPE ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

The respondents oppose the petition for certiorari on the following grounds:

I.

The mere fact that the federal courts of appeals have come to different conclusions on cases brought under the Civil Rights Act is no reason for granting certiorari in this case. Such differences are due to different factual situations and not to a conflict in principle of law.

Petitioners under "Questions Presented" (Petition, p. 2) set forth four propositions for this court's consideration.

These have to do with whether their complaint sets forth a cause of action under the Civil Rights Act and whether a municipal corporation is liable for the actions of its police officers under such act.

Petitioners under "Reasons for Granting the Writ" (Petition, pp. 6-11) do not discuss the four propositions set forth under "Questions Presented" but argue that a conflict in the decisions of the federal courts of appeals requires this court to grant certiorari.

Petitioners cite many cases without giving any facts or showing in any way that any substantial conflict exists in the courts below but they insist that this court compare the various decisions to determine such fact.

It is not the function of this court to find grounds for granting certiorari. This burden is on petitioners.

Petitioners assert that the court below has rendered conflicting opinions (Petition, p. 8). They ask that *Geach* v. *Moynahan*, 7 Cir., 207 F. 2d 714, be compared with *Jennings* v. *Nester*, 7 Cir., 217 F. 2d 153, and with the opinion in the case at bar (Petition, p. 8).

Petitioners state that in the *Geach* case it was held that an unreasonable arrest, search, detention and coercion of a confession created a Civil Rights Act cause of action but that in the *Jennings* case and in the case at bar, "(similar facts)" resulted in opposite holdings.

Respondents submit that the facts in the *Geach* case are not similar to the facts in the *Nester* case and the case at bar.

In the *Geach* case, a confession was coerced from the plaintiff. In the *Nester* case no confession was coerced. In the case at bar no confession was coerced from any of the petitioners. In the case at bar, the only petitioner arrested was released without any charge being placed against him.

This court denied certiorari in the *Nesbit* case, 349 U. S. 958.

In the case at bar, petitioners charge respondents with: (1) unlawful search and seizure; (2) unjustified batteries; and (3) unjustified secret detention. These charges are not the same as the ones in the *Gracie* case and petitioners' comparison is erroneous.

Petitioners place great reliance on *Wolf* v. *Colorado*, 338 U. S. 25 (Petition, p. 8) and attempt to show that the decisions below conflict with it.

The *Wolf* case was a state criminal case in which this court held that in a state court criminal prosecution the Fourteenth Amendment does not prohibit the introduction of evidence obtained by an unreasonable search and seizure.

Petitioners have seized upon a statement made by the court in the *Wolf* case, regarding the "Due Process Clause," and attempt to base a Civil Rights Act action on such statement.

The *Wolf* case decided nothing about a Civil Rights Act cause of action and is not helpful in any way in deciding the issues in the case at bar.

Petitioners under Appendix F (Petition, p. 36) show seven Civil Rights Act cases in which this court denied certiorari.

In all seven cases, the United States Courts of Appeals held that no Civil Rights Act cause of action was shown.

The facts in those seven cases were stronger or similar to the facts in the case at bar.

Whether or not a Civil Rights Act cause of action accrues must necessarily depend on the facts in each case. The difficulty is not with the law but with its application. This is shown in *Picking* v. *Pennsylvania Railroad Co.*, 3 Cir., 151 F. 2d 240, where the court said (p. 249):

> "* * * as we read R. S. 1979 (42 U. S. C. A. sec. 1983) in the light of the *Screws* decision, [*Screws* v. *United States*, 325 U. S. 91] we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by an officer acting under pretense of state law. A field was created upon which a state officer could not tread without being guilty of trespass and liable in damages. *The concept is clear enough but the boundaries of the forbidden territory are ill-defined.*" (Emphasis added.)

In *Yglesias* v. *Gulfstream Park Racing Assn.*, 5 Cir., 201 F. 2d 817, certiorari denied 345 U. S. 993, an action under 42 U. S. C. A. sec. 1983, in upholding the trial court's dismissal of the complaint, the court said (p. 818):

> "Since *Snowden* v. *Hughes*, 321 U. S. 1, 11, * * * it has been said over and over again that it was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern."

Petitioners are trying to establish a federal forum for matters that belong in a state court where complete redress is available.

If petitioners were to prevail, then every false arrest, unreasonable search, and false imprisonment would become a Civil Rights Act cause of action. This court in *Snowden* v. *Hughes*, 321 U. S. 1, 11, has disclaimed such intention for the Civil Rights Act and has left the question of what is a Civil Rights Act cause of action to be determined by the facts of each particular case.

Petitioners' claim of conflict in the opinions of the federal courts of appeals is without merit. What facts constitute a Civil Rights Act cause of action can be ascertained without the addition of any further decisions. Courts will always disagree on the facts. This disagreement does not

constitute a conflict on the basic principle of law. The basic principle of law is crystallized and uniformly applied by the various courts of appeal.

II.

The Appeals Court correctly held that petitioners' complaint failed to state a cause of action under the Civil Rights Act.

Although petitioners have failed to argue the merits of their complaint, respondents will show that the complaint failed to state a cause of action under the Civil Rights Act.

The opinions of the Appeals Court and the trial court, shown in Appendix A and C (Petition, pp. 13, 16), clearly show that petitioners' complaint fails to state a cause of action under the Civil Rights Act. Respondents can only enlarge on those opinions.

Petitioners' complaint charges respondents with (1) unlawful search and seizure, (2) unjustified batteries, and (3) unjustified secret detention.

Respondents submit that none of these acts constitute a violation of the Civil Rights Act.

In *Douglas* v. *Nester*, 7 Cir., 217 F. 2d 153, certiorari denied 349 U.S. 958, the complaint charged a violation of the Civil Rights Act, sections 1983, 1985. It charged three defendants, police officers, with unlawful search of plaintiff's person, the seizure of his personal property, the introduction in evidence at a criminal trial against plaintiff of the unlawfully seized property, and the deliberate use of perjured testimony at said criminal trial. It was held that such allegations failed to state a cause of action under the Civil Rights Act.

In *Love* v. *Chandler*, 8 Cir., 124 F. 2d 785, the district

court's dismissal of a complaint which was based on 42 U. S. C. A. Section 1985 was affirmed. The complaint alleged that plaintiff was subjected to assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the W. P. A., inflicted upon him by defendants, who were officers or agents of the United States or the State of Minnesota. In affirming the dismissal, the court pointed out that plaintiff had not been deprived of equal protection of the law, saying (p. 787):

> "The appellant does not seek redress because the State of Minnesota is discriminating against him or because its laws fail to afford him equal protection. . . . The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think, within the exclusive province of the State."

In *Miles* v. *Armstrong*, 7 Cir., 297 F. 2d 284, plaintiff alleged as a violation of the Civil Rights Act an aggravated assault on his person. In denying that this was a deprivation of federal rights, the court said (p. 287):

> "... we think that the rights of which plaintiff avers he has been denied are those which he enjoys under the laws of Illinois and which are incidental to state citizenship. The injuries he asserts he has suffered are, in essence, an aggravated assault upon his person and wanton destruction of his property—grievous injuries surely. But they do not constitute privileges and immunities incident to United States citizenship; they are rather such that the perpetrators are punishable under the state law where reparation may be obtained."

In *Lyons* v. *Weltmer*, 4 Cir., 174 F. 2d 473, plaintiff alleged that defendant, superintendent of a state hospital for the insane, improperly confined him there in violation of the Civil Rights Act. The dismissal of the action was affirmed. The court said (p. 473):

> "* * * Without attempting to define the cases in which abuse of power by a state official may justify suit in the federal courts, it is perfectly clear that the case alleged does not fall within that category. If it did, every case against a state officer for false arrest or false imprisonment would be cognizable in the federal courts. See *Screws* v. *United States*, 325 U. S. 91, 109, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; *Bell* v. *Hood*, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939; *McCarthy* v. *West Virginia*, 4 Cir., 156 F. 2d 739; *Leo Lawsine* v. *The Glenn L. Martin Co.*, 4 Cir., 170 F. 2d 985."

In *Yglesias* v. *Gulfstream Park Racing Assn.*, 5 Cir., 201 F. 2d 817, 818, certiorari denied 345 U. S. 993, which was an action under section 1983, Civil Rights Act, the complaint alleged that defendant caused plaintiff to be falsely imprisoned for an unreasonable period of time without bond and without an opportunity to confer with counsel [the same charges being made in the suit at bar], and caused her to be put on trial on a criminal charge "by trick or fraud" without reasonable opportunity to prepare for trial, thereby depriving her of her liberty without due process of law, and of the right to have a fair trial conducted in accordance with due process of law. In upholding the trial court's dismissal of the complaint, the court held that none of the charges stated a civil rights cause of action and that (p. 818) not even malicious prosecution is a violation of the Civil Rights Act.

In *Eaton* v. *Bibb*, 7 Cir., 217 F. 2d 446, 449, certiorari denied 350 U. S. 915, the complaint alleged that the plaintiff was falsely arrested, kidnapped and falsely imprisoned by a conspiracy of peace officers. In upholding the trial

court's dismissal of the complaint, the court held no civil rights cause of action was stated.

In the case at bar, the most that the complaint shows is false arrest, assault, unreasonable search, and false imprisonment. Since these charges have been held not to be a violation of the Civil Rights Act, they cannot be the basis of action under section 1983, deprivation of due process, or section 1985, deprivation of equal protection of the law, or section 1986, failure to prevent a deprivation of equal protection of the law.

The trial court properly dismissed petitioners' case and the Appeals Court correctly affirmed the dismissal.

III.

The City of Chicago is not liable for the acts of its police under the Civil Rights Act.

If this court holds for the respondents under Point II of this brief then it will be unnecessary to decide if the City of Chicago is liable for the acts of its police officers under the Civil Rights Act. Therefore, this point is argued in the alternative.

Aside from the Illinois law on the immunity of the City of Chicago in a case of this kind, in *Cuiksa* v. *City of Mansfield*, 6 Cir., 250 F. 2d 700, it was held that municipalities are not liable for acts of their police officers under the Civil Rights Act. The court said (p. 703):

> "* * * governmental immunity exists with respect to the municipality * * * in their governmental functions, which has not been abrogated by the Civil Rights Act."

Therefore, irrespective of whether the complaint states a cause of action against the police officers [which we have proven is not true] a municipality is not liable under the Civil Rights Act.

Conclusion.

We have demonstrated that this case presents no important questions of federal law and that it is not in conflict with the decisions of this court or with those of any other federal courts of appellate jurisdiction; that the conflict contended for by petitioners arises from the factual situation in each case, and that this court has shown by consistently refusing certiorari in cases of this kind that it does not consider the question needs clarification.

Petitioners have failed to show or argue that their complaint shows a cause of action under the Civil Rights Act or that respondent City of Chicago is liable thereunder for the acts of its police.

Respondents have shown that the petitioners' complaint does not state a cause of action under the Civil Rights Act and that respondent City of Chicago is not liable under such act for the actions of its police.

Petitioners' remedy, if any, as stated by the Appeals Court (Petition, p. 16) is in the state courts.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 742

JAMES MONROE, ET AL.,

Petitioners,

vs.

FRANK PAPE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 712

JAMES MONROE, ET AL.,
Petitioners,

vs.

FRANK PAPE, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioners' Reply Brief

ARGUMENT.

1. Respondents decline to discuss the expressions of "doubt and confusion" by two circuits which are quoted at page 7 of the Petition for Certiorari.

2. Respondents do not discuss, distinguish or even mention *Davis* v. *Turner*, 197 F. 2d 847 and *Jackson* v. *Duke*, 259 F. 2d 3 (Petition for Certiorari, p. 6), the Fifth Circuit decisions which squarely conflict with the decisions below. Respondents do not attempt to explain away the conflict because they cannot. Petitioners' complaint would have been sustained in the Fifth Circuit.

3. Respondents urge that "what facts constitute a Civil Rights Act cause of action can be ascertained without the addition of any further decisions. Courts will always disagree on the facts." (Brief in Opposition, p. 4) This assertion is incomprehensible, since no "facts" are in dispute in this case, and, on almost identical "facts," the Fifth Circuit has decided the same question in the opposite way. If "this disagreement does not constitute a conflict on the basic principle of law" (Brief in Opposition, pp. 4-5), we are at a loss to conceive what does. Petitioners' complaint would have been sustained in the Fifth Circuit.

4. If respondents are correct, and no Federal remedy exists for victims of the "midnight knock on the door" by police officers—and all that is implied by that phrase—then this Court should grant certiorari and say so explicitly and thus end the spate of Federal litigation on this very issue which has continued for over 15 years. (See Petition for Certiorari, Appendix G, pp. 37-43.)

5. Respondents quote with approval (Brief in Opposition, pp. 3-4) *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, as saying of R.S. § 1979 that "Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by an officer acting under pretense of state law." This is correct. It raises the key question in this case: if the complaint at bar does not plead such a "right of action," what complaint ever can?

6. Respondents (Brief in Opposition, pp. 4, 9) and the court below (Petition for Certiorari, Appendix A, p. 16) seem to urge that the availability of a state court remedy somehow bars petitioners from obtaining redress under the Civil Rights Act. This notion is totally unjustified.

As the Ninth Circuit has recognized, to dismiss a Civil Rights Act complaint because of the availability of a state remedy would be to act "from a viewpoint exactly contrary to this obvious purpose of the Civil Rights legislation to give the litigant his choice of a Federal forum rather than that of a state." *Romero* v. *Weakley*, 226 F. 2d 399, 401 (9th Cir. 1956)

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

JAMES MONROE, et al.,

Petitioners,

vs.

FRANK PAPE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

JAMES MONROE, et al.,

Petitioners,

vs.

FRANK PAPE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Petitioners

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (R. 31-34) is reported at 272 F. 2d 365 (1959). The judgment of the Court of Appeals is at R. 34.

The opinion of the District Court (R. 20-31) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1959. (R. 34). The petition for a writ of certiorari was granted on March 28 1960. —— U.S. ——. (R. 35). The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners, a husband, wife and their six children, stated a cause of action for damages under the Civil Rights Act, R.S. § 1979, when they alleged that thirteen Chicago police officers, acting under color of law: arbitrarily and unreasonably broke into their home and searched it in the nighttime without a warrant; assaulted and battered them without cause; humiliated them with invidious references to their race; forced two of them from their bed naked; arbitrarily arrested and secretly confined one of them for interrogation and exhibition in line-ups and, finally, released him without ever charging him with a crime.

2. Whether a municipal corporation can be sued under R.S. § 1979 for damages arising from fourteenth amendment due process violations by its police officers.

STATUTES INVOLVED

R.S. § 1979 (42 U.S.C.A. § 1983):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 (28 U.S.C.A. § 1343):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. (1958 ed.) § 1331 (28 U.S.C.A. § 1331):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Amendment 14, Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

Petitioners brought this action for damages, alleging violation of their fourteenth amendment rights, under the Civil Rights Act, R.S. § 1979, in the United States District Court for the Northern District of Illinois against thirteen Chicago police officers and the City of Chicago.[1] On June 5, 1959, the District Court dismissed the complaint for failure to state a claim. Leave to amend the complaint was denied. (R. 18). On November 23, 1959, the Court of Appeals affirmed, for the same reason. (R. 33, 34).

The complaint asserted:

In the early morning of October 29, 1958, Mr. and Mrs. James Monroe and their six children were at home in their Chicago apartment, asleep in their beds. At 5:45 A.M., Deputy Chief of Detectives Pape and twelve other policemen broke and entered through the front and rear doors of the Monroe dwelling. (R. 3).

Chief Pape and two others entered the bedroom of Mr. and Mrs. Monroe. They shined flashlights into the faces of the sleeping couple, pointed their pistols and ordered James Monroe out of his bed. Chief Pape cursed Mr. Monroe and threatened to shoot him if he didn't move fast. Mr. Monroe was naked. He left the bedroom at gunpoint. He was forced to stand in the center of his living room naked. (R. 3).

Another officer ordered Mrs. Monroe out of bed. She refused, explaining that she was naked. The officer dragged her out and pushed her into the living room. Chief Pape was questioning Mr. Monroe. He kept calling him "nigger"

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[1] Federal jurisdiction was invoked "under 28 U.S.C.A. §§ 1331 and 1343 and 42 U.S.C.A. § 1983, . . . and Amendment XIV to the Constitution of the United States." (R. 1).

and "black boy," and hit him in the belly with his flashlight several times. Meanwhile, the six children were being herded into the living room. One detective kicked four-year-old James Monroe, Jr., who fell to the floor and began to cry. Later, Chief Pape struck Robert Stevens, knocked him down and pushed a third child, Houston, to the floor on top of Robert. (R. 3-4).

Mrs. Monroe's daughter Jacqueline started for the back door. She wanted to reach a telephone, call a family friend and get help. An officer stepped between Jacqueline and the door, pushed her down and prevented her from leaving. (R. 4-5).

The police searched every room. They ransacked the closets, throwing all the family's clothing on the floor. They opened and dumped all the drawers in the various pieces of furniture. They ripped open all the mattresses. (R. 3-4, 5).

Mr. Monroe was then allowed to dress. His hands were chained together and he was escorted outside. (R. 5).

The police had no warrant for the search or the arrest. (R. 6). The search and seizure was arbitrary and unreasonable. (R. 9).

Mr. Monroe was taken to police headquarters and imprisoned for about ten hours. Periodically, Mr. Monroe was removed from his cell and placed on exhibition in "line-ups." Between line-ups he was interrogated about a murder. (R. 6-7).

Throughout his imprisonment Mr. Monroe was held on "open" charges. No bail was set. He was refused permission to call an attorney or his family. No one informed Mr. Monroe of his rights. (R. 7). The police had no intention of bringing him promptly to court to answer to a charge of crime. They had not arrested him for this pur-

pose. He was being held in an attempt to coerce incriminating statements from him, to exhibit him before other officers and civilians, to punish him, and to "check up" on his background. (R. 7-9). He was never brought before a judge. (R. 7).

Twenty local courts with jurisdiction to receive criminal complaints and to admit to bail were in session during Mr. Monroe's detention, four of them in the same building where he was held. (R. 8).

After ten hours, Mr. Monroe was released without charge. No charge ever was placed against him. (R. 7-8).

All of the officers involved "were duly appointed, qualified and acting police officers . . . of the . . . City of Chicago . . . and were agents of the . . . City, acting in the course of their employment and engaged in the performance of their duties as police officers. . . ." (R. 1). All of them were assigned to the Police Department's "Detective Bureau," and they were personally led by the respondent Frank Pape, Deputy Chief of Detectives—the second ranking officer in the Bureau. (R. 2).

At all times mentioned, these officers were "acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois . . . and the City of Chicago." (R. 2).

The Pleadings: Count I of the complaint (R. 1-10) alleges the facts and prays judgment for petitioner, Mr. James Monroe. Count IV (R. 12) incorporates the facts by reference and prays judgment for petitioner Mrs. Flossie Monroe. Count VII (R. 14-15) incorporates the facts by reference and prays judgment for each of the six Monroe children, who are also petitioners here. These counts invoke R.S. § 1979. The remaining counts of the complaint invoke R.S. §§ 1980 and 1981, which, for the reasons stated in the brief (p. 20), are not relied upon by petitioners in this Court.

SUMMARY OF ARGUMENT.

Petitioners' complaint states a cause of action against the individual police officers under R.S. § 1979, because it properly alleges that the officers, acting under color of law, committed an unreasonable search of petitioners' home in the nighttime, in violation of the due process clause of the fourteenth amendment. This Court, in *Wolf* v. *Colorado*, 338 U.S. 25 (1949) and *Elkins* v. *United States*, 364 U.S. (Adv.), 80 S. Ct. 1437 (1960), has held that such searches violate the due process clause.

Respondents' suggestion that no federal remedy is available in a damage action under R.S. § 1979, if an adequate state judicial remedy exists, is ill-founded. Title 28 U.S.C. § 1343 (3) explicitly confers "original jurisdiction" upon federal district courts in actions brought under R.S. §1979.

The "specific intent" rule which is a requirement of proof, if not of pleading, in criminal prosecutions under the Civil Rights Act (*Screws* v. *United States*, 325 U.S. 91, 103 (1945)), is not applicable to the case at bar which involves civil liability. The "specific intent" doctrine of *Screws* was imposed to meet fifth amendment vagueness objections to the criminal statute (18 U.S.C. § 242) there involved. These objections are not applicable to statutes creating mere civil liabilities. Congress has recognized this fact by inserting in § 242 the word "willfully." It did not so act in the case of R.S. § 1979. Thus the statutory predicate for the "specific intent" rule in *Screws* is lacking here. No unfairness can result from not requiring petitioners to show "specific intent," because police brutality and unreasonable searches and seizures have been outlawed in Anglo-American law for centuries. The respondents could not have been misled.

The City of Chicago is liable under the complaint because the rule of *respondeat superior* is implicit in the provisions of R.S. § 1979, and the fourteenth amendment, which R.S. § 1979 was passed to enforce. In the alternative, the congressional debates on R.S. § 1979, contemporary construction of its provisions, and past holdings of this Court indicate that the city is a "person" within the meaning of the statutory prohibition upon "every person." This fact is reinforced by the Act of Congress passed February 25, 1871—just seven weeks before enactment of R.S. § 1979—which provides that the word "person" may be construed to include bodies "politic and corporate."

No exception to the rule of liability contained in the statute should be, by judicial interpretation, read into its provisions. This is so because the rule of municipal immunity which respondents seek to engraft upon the statute was not universally accepted in the law at the time R.S. § 1979 was adopted. In addition, the rule of municipal immunity is unjust and harmful to the community. By no stretch of imagination can municipal immunity be termed "one of the presuppositions of our political history." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951).

State municipal immunity law cannot control construction of the Federal Civil Rights Act because the purpose of both the Act and the fourteenth amendment is to secure uniform protection for civil liberties throughout the country. If the Act's application is made dependent upon local law in questions of liability, its provisions will mean different things in different states. The Act will also mean different things at different times in the same state. Illinois is a good example. There, the rule of immunity has been abolished as to cities, effective Dec. 16, 1959.

The dearth of civil damage actions for police misconduct in every state in the nation makes it clear that no unreasonable burdens will be imposed upon cities if the Court refuses to read an exemption into the Act on their behalf.

ARGUMENT.

"Freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dread knock on the door in the middle of the night. . . ."

Dwight D. Eisenhower, "U.S. Law Day" Address, May 1, 1958. *Time Magazine*, May 5, 1958, p. 11.[1]

I.

THE LIABILITY OF THE INDIVIDUAL POLICE OFFICERS.

A. THE COMPLAINT STATES A CAUSE OF ACTION UNDER R.S. § 1979.

Jurisdiction of the District Court below was invoked (R. 1) under 28 U.S.C. § 1343, 28 U.S.C.A. § 1343:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . . .

"(3) To redress the deprivation, under color of any State Law. . . of any right . . . secured by the Constitution of the United States. . . ."

[1] The nations of the world agree that the inviolability of the home, free from arbitrary official intrusion, is a fundamental right of man. See the collection of the constitutional search and seizure provisions of 60 nations in Appendix C, pp. 84-106, of this Brief.

Petitioners' civil action was authorized by the following law:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any other person . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law. . . ."
>
> R.S. § 1979, 42 U.S.C.A. § 1983.[2]

Petitioners claim that respondents violated rights secured by the due process clause of the Fourteenth Amendment. (R. 9).

1. The Fourteenth Amendment Due Process Rights of Petitioners Were Violated by the Unreasonable Search and Seizure Alleged in the Complaint.

The complaint alleges a nighttime search of petitioners' home by city police officers conducting a criminal investigation. (R. 3-5). It alleges that respondents had no warrant (R. 6), and that the search was "arbitrary and unreasonable." (R. 9).

These acts constituted "state action" for fourteenth amendment purposes, and were committed under color of law. (R. 1-2); *Williams* v. *United States*, 341 U.S. 97, 99-100 (1951); *Screws* v. *United States*, 325 U.S. 91, 107-108, 109-10 (1945).

Under *Wolf* v. *Colorado*, 338 U.S. 25 (1949), the acts of respondents violated petitioners' fourteenth amendment rights:

> "[N]othing could be of greater relevance to the present inquiry than the underlying constitutional

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[2] This section was invoked by Count I (R. 9), Count IV (R. 12) (incorporation by reference), and Count VII (R. 14) (incorporation by reference).

Federal jurisdiction was also invoked under 28 U. S. C. § 1331 and the Fourteenth Amendment.

doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."

Elkins v. *United States,* 364 U.S. (Adv.), 80 S. Ct. 1437, 1442 (1960).

Thus, petitioners have alleged every element of the cause of action conferred by R. S. § 1979, and the dismissal of their complaint was error.[3] *Cf., Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Smith* v. *Allwright,* 321 U.S. 649 (1944).

---

[3] This conclusion is in accord with that of the Fifth Circuit in Davis v. Turner, 197 F. 2d 847 (1952), which is squarely in point.

This conclusion is supported also by the suggestion in Irvine v. California, 347 U.S. 128, 137-38 (1954) by Justice Jackson and Chief Justice Warren, that the officers who in that case invaded the privacy of a gambler's home be prosecuted under the criminal provisions of the Civil Rights Act:

This conclusion is also *in accord* with the following cases which, although not squarely in point, may be deemed relevant:

Jackson v. Duke, 259 F. 2d 3 (5th Cir. 1958).
Coleman v. Johnston, 247 F. 2d 273 (7th Cir. 1957).
Geach v. Moynahan, 207 F. 2d 714 (7th Cir. 1953).
McShane v. Moldovan, 172 F. 2d 1016 (6th Cir. 1949).
Davis v. Johnson, 138 F. Supp. 572 (N.D. Ill. 1955).
State of Arkansas v. Central Surety Corp., 102 F. Supp. 444 (W.D. Ark. 1952).
Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950) (Dictum).
Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947).

This conclusion is *opposed* by the following cases which appear to be in point:

Jennings v. Nester, 217 F. 2d 153 (7th Cir. 1954).
[Criticized, Comment, 103 U. Pa. L. Rev. 1088 (1955).]
Mackey v. Chandler, 152 F. Supp. 579 (W.D.S.C. 1957).
[Criticized, Comment, 10 Stan. L. Rev. 347 (1958).]

Although there are other lower court cases which are seemingly opposed in principle to petitioners' present contention, the above two opinions are the only reported adverse decisions explicitly dealing with unreasonable searches and seizures by police officers.

All reported decisions known to petitioners involving civil suits against police officers under the Civil Rights Act were briefed in Appendix G to the Petition for Certiorari in this case.

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The plain language of the statutes, of *Wolf*,[4] and of *Elkins*, makes it clear that a cause of action has been stated under R. S. § 1979. However, because the courts below have denied this conclusion, petitioners have attached as Appendix A to this brief (pp. 67-76) a memorandum demonstrating that the individual's right to privacy in his home, free from unreasonable searches, is indeed "implicit in the concept of ordered liberty," and that the Congress which enacted R. S. § 1979 knew it.

Nothing in *Stefanelli* v. *Minard*, 342 U.S. 117 (1951), is inconsistent with the view urged here. *Stefanelli* involved an attempt under R. S. § 1979 to secure an injunction from a federal district court against the use in a state criminal trial of evidence which had been illegally seized by local police. This Court invoked the doctrine of equitable discretion and declined to interfere with the state proceedings, saying:

> "... [U]nder the very section now invoked, we have withheld relief in equity *even when recognizing that comparable facts would create a cause of action for damages.*"
>
> 342 U.S. at 122 (Emphasis supplied).[5]

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[4] The repulsiveness of the "additional aggravating conduct" [Irvine v. California, 347 U.S. 128, 145 (1954) (dissenting opinion)] which accompanied the unreasonable search in the instant case, brings the violation of petitioners' home to the "core" of the proscription of the fourth amendment. See Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[5] The Court in Stefanelli expressly left open the question whether the complaint in that case stated a cause of action under R. S. § 1979. 342 U.S. at 120.

It should be noted that the majority opinion in Stefanelli was foreshadowed by Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950), and the Court was familiar with the opinion in that case. See 342 U.S. at 124 n. 12. In Erickson, District Judge Ryan had broadly hinted that a federal cause of action for damages under R. S. § 1979 was available to the victim of an unreasonable search by local police. 94 F. Supp. at 460 (final paragraph).

The decisive consideration which led the Court in *Stefanelli* to deny relief is absent in the case at bar; this action is not an attempt to "interfere with [a] State criminal prosecution." 342 U.S. at 121. The courts below were not asked by petitioners to "intervene piecemeal to try collateral issues" in a pending Illinois litigation. See 342 U.S. at 123. Thus, not only is the *Stefanelli* doctrine of "[d]iscretionary refusal to exercise equitable power" (342 U.S. at 121) inappropriate in the present action at law, but the policy which counseled the exercise of that discretion in *Stefanelli* is inapplicable here.

2. The Availability of State Judicial Remedies for the Wrongs Alleged in the Complaint Does Not Bar Petitioners' Federal Remedy Conferred by the Civil Rights Act.

Respondents (Brief in Opposition to Cert., pp. 4, 9), and the Court below (R. 33), seem to urge that the availability of a state tort remedy somehow bars petitioners from obtaining redress under the Civil Rights Act.[6]

This construction negates both the language and policy of the Act; in effect, it operates as a judicial repealer.

Section 1979 confers a remedy for violation of federal constitutional rights. It contains no exceptions. Title 28, § 1343 (3) provides that federal district courts are to have

[6] The Seventh Circuit's position on this point is more clearly stated in the cases cited in the opinion below. Thus, in United States ex rel. Atterbury v. Ragen, 237 F. 2d 953 (7th Cir. 1956) it was held that a complaint failed to state a claim under R. S. § 1979 because:

> "The common law provides adequate action for damages against errant law enforcement officials."
>
> 237 F. 2d at 955 (Cited at R. 33).

This same statement was made in Jennings v. Nester, 217 F. 2d 153, 155 (7th Cir. 1954), also cited at R. 33. It was quoted again on March 4, 1960, in Egan v. Aurora, 275 F. 2d 377, (7th Cir.).

"original jurisdiction" of such cases. It contains no exceptions.[7]

In passing these laws, Congress, performing its constitutional function of enforcing the fourteenth amendment by "appropriate legislation" (Amend. XIV, § 5), saw fit to give litigants a federal remedy in federal courts for the violation of federal rights. Respondents and other who disagree with this congressional policy are free to seek amendment or repeal of the Act. But courts should not emasculate the Act because they doubt its wisdom. Cf. *Flemming* v. *Nestor*, 363 U.S. (Adv.) 603, 611 (1960); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring).

> "Full force and effect is therefore given to Section Five [of the Fourteenth Amendment], which declares that 'Congress shall have power to enforce by appropriate legislation the provisions of this article.' . . . . It is for Congress in its discretion to determine what legislation is appropriate, and its decision is binding upon every other department of the government."
>
> Rep. Stoughton, Michigan, *Globe* 322 (March 29, 1871). [All *"Globe"* references are to *Cong. Globe*, 42d Cong., 1st Sess.]

Significantly, there are those who believe that the policy of federal protection of federal rights is wise indeed. See, e.g., *To Secure These Rights—The Report of the President's Committee on Civil Rights, passim* (1947). Thus,

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[7] As originally passed, the Civil Rights Act of 1871 provided for exclusive federal jurisdiction. 17 Stat. 13. With the codification of 1874, the substantive and jurisdictional portions of the Act were separated and placed in different titles, and the phrasing of the jurisdictional paragraphs was consequently altered so that they might be comprehensible standing alone. See R.S. §§ 563 (12), 629 (16). But there is no evidence that, in enacting the Revised Statutes of 1874, the Congress intended to change the meaning of the law. And 28 U.S.C. § 1343, as it stands today, provides for "original jurisdiction" in federal district courts as clearly as it is possible for words to do.

Professor Herbert Wechsler, after discussing with approval the doctrine of "equitable abstention" by federal courts in federal question cases, goes on to say:

> "These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws. There Congress has declared the historic judgment that within this precious area, *often calling for a trial by jury*, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern."
>
> Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 *Law & Contemp. Prob.* 216, 230 (1948) (Emphasis supplied).

This Court, in a damage action under the very section invoked here, said:

> "Barring only exceptional circumstances . . . or explicit statutory requirements . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."
>
> *Lane* v. *Wilson*, 307 U.S. 268, 274 (1939).[8]

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[8] Such "exceptional circumstances" are presented when resolution of a federal constitutional question depends upon the meaning of a state statute which has not yet been authoritatively construed by the state courts. Even then, the district court should not dismiss the complaint; its proper course is to stay proceedings pending the outcome of state litigation to secure an interpretation of the state statute involved. Harrison v. N. A. A. C. P., 360 U.S. 167, 177, 179 (1959).

In the case at bar, petitioners' rights were not violated by a state statute. They were violated by the brute force of state officers acting, as respondents admit, "in the performance of a governmental function." (R. 18). There is nothing for the state courts to construe. Petitioners have therefore invoked the remedy which Congress has clearly, simply, and explicitly given them. *Cf.* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 283-85 (1913).

The Ninth Circuit has drawn the obvious inference:

> "[The] obvious purpose of the civil rights legislation [is] to give the litigant his choice of a federal forum rather than that of a state."
>
> *Romero* v. *Weakley*, 226 F. 2d 399, 401 (1955).

The language of the statute itself is clear and disposes of the issue.[9]

3. The "Specific Intent" Doctrine of Screws v. United States is Inapplicable to Civil Actions under R.S. § 1979.

The complaint at bar does not allege that respondents acted with specific intent to deny petitioners their constitutional rights. Although respondents have never raised this omission as a defense, we will discuss it, since it was an important issue in *Screws* v. *United States*, 325 U.S. 91 (1945).

In *Screws*, this Court reviewed the federal conviction of a Georgia sheriff who had beaten his prisoner to death. The Government convicted Screws under a Criminal Code provision which, like R. S. § 1979, forbids violation of "rights . . . secured . . . by the Constitution. . . ." 18 U.S.C. § 242.[10] Unlike R. S. § 1979, Section 242 requires that the violation be "willful."

Sheriff Screws contended that § 242 was unconstitutionally vague, asserting that the section "lacks the basic

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[9] Appendix B, pp. 77-83, contains excerpts from the legislative history demonstrating (1) that Congress intended the Act to have nationwide application, and (2) that policy considerations still relevant today formed the basis for the congressional decision to confer *federal* jurisdiction in civil rights cases without regard to the possible existence of state causes of action arising out of the same facts.

[10] Section 242 was, at the time of *Screws*, found at 18 U.S.C. § 52.

specificity necessary for *criminal* statutes under our system of government." 325 U.S. at 96 (Emphasis supplied). Faced with a serious constitutional problem raised by the sweeping construction of the statute below, this Court avoided holding § 242 void for vagueness by restricting its application. The Court pointed to the word "willfully" in § 242. It read "willfully" as imposing a requirement of "a specific intent to deprive a person of a federal right made definite by decision or other rule of law. . . ." 325 U.S. at 103.

The complaint at bar alleges violation of a constitutional right "made definite" in *Wolf* v. *Colorado*, 338 U.S. 25 (1949). It does not allege "specific intent." It does not have to. On this issue *Screws* is distinguishable.

Section 242 contains the word "willfully." Section 1979 does not. Congress added "willfully" to § 242 to make it "less severe." See 325 U.S. at 100.[11] It did not so amend § 1979.

Moreover, the fifth amendment objections to § 242, which led to the restrictive holding of *Screws*, are not applicable to § 1979, because § 1979 is not a criminal statute. It is a civil statute. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters* v. *New York*, 333 U.S. 507, 515 (1948). Accord: *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242, 250 (1922). "The basis for this distinction is evident. It is . . . a more serious matter to deprive a man of his liberty on a prosecution based upon a vague and indefinite statute than to deprive him of a property right alone." *General Construction Co.* v. *Connally*, 3 F. 2d 666, 667 (W.D. Okla. 1924), aff'd, 269 U.S. 385 (1926). Accordingly, the Third Circuit,

[11] See 43 Cong. Rec., 60th Cong. 2d Sess., p. 3692 (——).

after carefully analyzing the *Screws* opinion, has concluded:

> ". . . R.S. § 1979 which creates a civil liability for a tortious act cannot be held too vague to meet the test of the Fifth Amendment because it does not refer to the state of mind of the tort-feasor."
>
> *Picking* v. *Penn. R. Co.*, 151 F. 2d 240, 249 (3d Cir. 1945).

No unfairness can result to respondents as a consequence of this Court's refusal to impose the strict criminal standard of "specific intent" laid down in *Screws*. Tort liability for unreasonable searches and seizures by law officers has existed at least since the 18th Century. *Entick* v. *Carrington*, 19 How. St. Tr. col. 1029 (K.B. 1765).[12] The fact that we have embodied the common law prohibition in our Constitution and that Congress has made a federal forum available to protect the right, should not operate to *increase* the burden of the plaintiff who has been wronged. No sane police officer could imagine that the law permits the deeds done to petitioners. Cf., *Lambert* v. *California*, 355 U.S. 225, 230-32 (1957) (dissenting opinion).

In any event, the rule of *Screws* is a rule of proof, not of pleading. No specific intent was laid in the *Screws* indictment. See 325 U. S. at 93. The reversal in *Screws* was for error in instructing the jury. 325 U.S. at 107. Since

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[12] This, without more, serves to distinguish Small v. American Sugar Refining Co., 267 U.S. 233, 239-40 (1925) from the case at bar. The statutory standard in Small was in the teeth of the common law. Compare the statement in Lorenson v. Superior Court, 35 Cal. 2d 49, 60, 216 P. 2d 859, 866 (1950):

> "Although higher standards will be required of penal than of civil statutes . . . a statute is sufficiently certain if it employs words of long usage or with a common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ. . . ."

indictments in criminal cases are construed more strictly than are complaints in civil cases, it follows a fortiori that the complaint is not vulnerable on the "specific intent" issue:[13]

> "[It is] the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
>
> *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

• • •

"The basic political problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty." Professor Monrad Paulsen, "The Exclusionary Rule and Misconduct by the Police," ..... *J. Crim. L., C. & P.S.* ....., ... (1960).[14]

The counts of the complaint alleging violation of R.S. § 1979 by the individual police officer respondents are good and should have been sustained.

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[13] *Accord*, Anderson v. Myers, 182 Fed. 223, 229-30 (C.C.D. Md. 1915), *aff'd.*, 238 U.S. 368 (1914); Brickhouse v. Brooks, 165 Fed. 534, 543-44 (C.C.E.D. Va. 1908). *Contra*, Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954).

[14] Article scheduled for publication this year; manuscript available at the office of Prof. Claude Sowle, Northwestern University College of Law.

The potential for tyranny which inheres in the unrestrained power of the police to enter private homes at will is illustrated by an almost forgotten incident. Professor Lasson has recounted it:

B. THE QUESTION OF LIABILITY UNDER R.S. § 1980 AND R.S. § 1981.

Petitioners are of the opinion that the facts stated in the complaint present a cause of action under R.S. § 1979. Whether they present a cause of action under R.S. § 1980 and § 1981 is less certain. It may be that R.S. §§ 1980 and 1981 were intended and should be construed to apply to a different type of fact situation. If petitioners are entitled to recover under R.S. § 1979, claims under R.S. §§ 1980 and 1981 would be superfluous. If petitioners are not entitled to recover under R.S. § 1979, R.S. §§ 1980 and 1981, as applied to the allegations of the complaint, would be of no value. (Our reasons for granting the writ in the petition for certiorari were grounded entirely upon R.S. § 1979.)

Petitioners therefore limit their claim to recovery in this case to the liability imposed by R.S. § 1979.

(Footnote 14 continued)

". . . the most outstanding of these instances was the case of Sir Edward Coke, the . . . most influential of the Crown's opponents. On the theory that certain works in preparation contained matter prejudicial to the prerogative, that seditious papers were in circulation among the popular party, and that this was an opportune time to discover them and to strike a telling blow, the Privy Council in 1634, when Coke was on his deathbed, sent a messenger to his home with an order to search for 'seditious and dangerous papers.' Practically all of his writings, including the manuscripts of his great legal works, his jewelry, money, and other valuables, and even his will, were seized under that warrant and carried away. His chambers at the Inner Temple were ransacked in the same manner. The havoc wrought by the custodians of these papers was wanton, and seven years elapsed before what remained was restored to his heirs at the request of the Long Parliament. His will, of great importance to his family, was never returned."

Lasson, The History and Development of the Fourth Amendment to the United States Constitution 31-32 (1937).

II.

THE LIABILITY OF THE CITY OF CHICAGO.

The complaint asserts the liability of the City of Chicago. This issue is one of the questions presented here. (Petition for Certiorari, p. 3). The courts below did not reach this question (R. 30, 33). It should, however, be resolved by this Court, since it is solely an issue of law and must necessarily arise upon a trial of this case. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

The individual respondents were, at the time of the wrongs complained of, "duly appointed, qualified and acting police officers . . . of the defendant City . . . ." They were all "agents of the . . . City," and were "acting in the course of their employment . . . ." (R. 1). The City of Chicago is a municipal corporation (R. 1, 18) which "may sue and be sued." Ill. Rev. Stat., Ch. 24 §2-9 (1959).[15]

The theory of the complaint is that under the circumstances here alleged the City is liable for the acts of its police officers, by virtue of *respondeat superior*. The City asserts that it is immune from suit under the Illinois doctrine of sovereign immunity because its police, in violating the Monroe home, were "in the performance of a governmental function." [16] (R. 18, 29).

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[15] The City of Chicago is bound by the provisions of Chapter 24. Bullis v. City of Chicago, 235 Ill. 472, 475 (1908).

[16] Illinois has abandoned the immunity doctrine as of Dec. 16, 1959, at least insofar as cities are concerned. *Compare* Molitor v. Kaneland Community School District, 18 Ill. 2d 11 (1959), *with* Peters v. Bellinger, 19 Ill. 2d 367 (1960).

Congress, acting by virtue of the enabling clause of the fourteenth amendment and the "necessary and proper clause" of article I, *may*, if it chooses, subject municipalities to suit for due process and equal protection violations by their officers "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[17] *United States Constitution*, Amend. 14, §5; Art. 1, §8, cl. 18; Art. VI, par. 2. Accord, *California* v. *United States*, 320 U.S. 577, 586 (1944) (Shipping Act of 1916); *United States* v. *California*, 297 U.S. 175, 184, 185 (1936) (Safety Appliance Act); *Frame* v. *City of New York*, 34 F. Supp. 194, 196 (S.D.N.Y. 1940) (Jones Act). The case at bar presents the question whether Congress *did* impose such liability when it enacted R.S. §1979. This is the first time this issue has been presented for decision in this Court.

The framers of §1979 did not discuss the question of *respondeat superior*. Thus, no matter which way the Court decides this issue, to some extent it will be making law. such "interstitial legislation" is proper because it is unavoidable.

We contend that the statute should be construed liberally so as to insure maximum protection for individual liberties. Respondents contend that it should be construed narrowly so as to incorporate Illinois common law doctrine restricting the individual's right to sue municipal corporations.

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[17] No provision of the Constitution forbids Congress to impose liability upon municipal corporations. The eleventh amendment is not applicable here. Lincoln County v. Luning, 133 U.S. 529 (1890), and the City has never argued that it is.

A. PRESUMPTIVELY, THE OBSOLETE DOCTRINE OF "SOVEREIGN IMMUNITY" SHOULD NOT BE ENGRAFTED UPON R. S. § 1979; THE BURDEN OF PERSUASION IS UPON THE CITY TO SHOW WHY THIS COURT SHOULD EXEMPT IT FROM THE STATUTE'S OPERATION.

Petitioners' argument on this point will, in many respects, parallel the argument of the Solicitor General of the United States in *United States* v. *Alabama*, No. 398, October Term, 1959. See, in particular, Brief for the United States in that case, pp. 35-40.

The framers of R.S. §1979 intended that it be given the most liberal possible construction. In the initial speech on the bill, its sponsor, Rep. Shellabarger of Ohio, stated:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficiently construed. . . . *The largest latitude consistent with the words employed* is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Globe*, Appendix 68 (March 28, 1871) (Emphasis supplied).

In the light of this unequivocal declaration by the Act's sponsor, it would be unreasonable to assume, without positive evidence, that Congress, *sub silentio*, intended to immunize municipal corporations from the prohibition of the statute.[18]

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[18] Cf. Rep. Monroe, Ohio, *Globe* 370 (March 31, 1871):

> "We feel that we ought to find in such an instrument protection for the people; that we have a right to take some pains to find it there; and that, in case of obscure or ambiguous phrases we should give to the natural rights of man the benefit of the doubt."

Rep. Monroe was speaking of the fourteenth amendment. His remarks typify the attitude of R. S. § 1979's supporters.

Our contention is reinforced by the best traditions of Anglo-American constitutionalism: in 1602, when the notion that "The King can do no wrong" was more widely accepted that it is today, the House of Lords laid down the law:

> "In divers cases the King is bound by act of parliament, although he be not named in it, nor bound by express words. And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named; for religion, justice, and truth are the sure supporters of the crowns and diadems of kings . . . ."
>
> *The Case of Ecclesiastical Persons,* Coke, Part V, p. 14a, 14b, 77 Eng. Rep. 69 (1602).[18a]

In any event, the occasionally invoked presumption that the sovereign is not intended to be bound by his own acts, applies only to the *enacting* soverign. *California* v. *United States,* 46 F. Supp. 474, 478 (N.D. Cal. 1942), aff'd, 320 U.S. 577 (1944). See *United States* v. *California,* 297 U.S. 175, 186 (1936). The City of Chicago is not the enacting sovereign in this case.

On May 4, 1959, a unanimous Court brushed aside objections based upon an alleged presumption that municipal corporations are not bound by federal statutes:

> "Respondents . . . claim . . . that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage . . . . But this Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law."
>
> *Plumbers of Local* 298 v. *County of Door, a Municipal Corporation,* 359 U.S. 354, 359.

[18a] The significance of this case for American law is discussed in elaborate detail in the Solicitor General's Brief for the United States, in United States v. Alabama, No. 398, October Term, 1959, at pp. 37-39 thereof.

Under these circumstances, the burden is upon the City to demonstrate in the clearest and most convincing manner that municipal corporations are exempt from the Act.

B. THE ONLY NATURAL INFERENCE FROM THE THE LANGUAGE, PURPOSE, FUNCTION, AND LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS STATUTE, IS THAT MUNICIPAL CORPORATIONS ARE LIABLE IN CIVIL ACTIONS BROUGHT UNDER THESE ENACTMENTS.

Revised Statutes §1979 makes liable in damages "every person" who violates the constitutional rights of another while acting under color of law.

(1) Petitioners contend that the rule of *respondeat superior* is so ancient and basic a legal concept and is so obviously related to the purpose and function of the Fourteenth Amendment and its enforcement legislation, that it must be considered part and parcel of R.S. §1979, even if the words "every person" are thought to refer merely to human individuals.

(2) In the alternative, petitioners contend that the statutory words "every person" include municipal corporations.

1. Respondeat Superior Is Implicit in the Statute.

We deal with a broadly phrased remedial statute which is to be construed liberally.

Section 1979 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment . . . ." 17 Stat. 13 (1871). The fourteenth amendment explicitly proscribes action by states. It would therefore seem, without more, that the implementing statute must apply to state municipal corporations. The implication seems clear:

> "[T]he provisions of the [Fourteenth Amendment] . . . are generic in their terms, are addressed, of course, to the States, but also to *every person*, whether natural or *juridical*, who is the repository of state power."
>
> *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 286 (1913) (Emphasis supplied).

As if to make assurance doubly sure, this Court repeated its point:

> "[T]he Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its *comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed.*"
>
> 227 U.S. at 288. (Emphasis supplied).

A concurring opinion in *Screws* v. *United States*, 325 U.S. 91, 115-16 (1945) reaches the indicated conclusion in the context of the Civil Rights Acts:

> "Abuse of state power was the target. Limits were put to state authority and states were forbidden to pass them, by whatsoever agency. It is too late now, if there were better reason than exists for doing so, to question that *in these matters abuse binds the state and is its act*, when done by one to whom it has given power to make the abuse effective to achieve the forbidden ends."
>
> *Screws* v. *United States*, 325 U.S. 91, 115-116 (1945) (Emphasis supplied).

If "abuse binds the state and is its act," then it seems to us that the corporate agency of the state which acted, should pay.

In short, this Court should do here what it did in *United States* v. *A & P Trucking Company*, 358 U.S. 121 (1958), where it read *respondeat superior* into a penal statute defining a criminal offense, under circumstances in which the "*superior*" was not even a legal entity, and at common law would clearly not have been subject to what the dissenters termed "vicarious criminal liability." See 358 U.S. at 125 and 128. The Court's description of "the policy to be served" in *A & P Trucking*, is relevant here:

> "The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law."
>
> 358 U.S. at 126.

Thus, no legal and historical exegesis of the words "every person" is necessary. Even if the word "person" refers only to individuals, the fourteenth amendment and the Act are pregnant with *respondeat superior*—a doctrine which is not new, not unjust, and is as basic to every lawyer's thinking now as it was in 1871. *Qui facit per alium facit per se.* See *Jones* v. *Hart*, Holt, K.B. 642, 90 Eng. Rep. 1255 (1698).

2. The City Is a "Person" within the Meaning of the Statute.

The statute makes "every person" liable. Does the word "person" include cities? Congress has said that it may.

The leading sponsor of R.S. §1979 said that it does. The very first case construing the statute said, by implication, that it does. This Court, by necessary implication, has *held* that it does.

(a) What Congress said.

Just seven weeks before it passed R.S. §1979, Congress adopted "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Act of Feb. 25, 1871, 16 Stat. 431. Concerning this act, it has been said:

> "Sometimes Congress supplies its own dictionary. It did so in 1871 in a statute defining a limited number of words for use as to all future enactments."
>
> Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Colum. L. Rev.* 527, 536 (1947).

This statute provided, in section two, that:

> ". . . [T]he word 'person' may extend and be applied to bodies politic and corporate . . . unless the *text* shows that such words were intended to be used in a more limited sense . . . ."
>
> 16 Stat. 431 (1871) (Emphasis supplied).[19]

Nothing in the *text* of R.S. § 1979 indicates any congressional intent to limit its applicability. As we have shown, there is much to indicate otherwise.

The City of Chicago is now and always has been a "body politic and corporate." Ill. Rev. Stat., Ch. 24, § 2-9 (1959);

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[19] The lineal descendant of this statute is found at 1 U.S.C. § 1. The statute now reads: " . . . unless the *context* indicates otherwise." (Emphasis supplied). Conceivably, this change is significant.

It should be noted that 1 U.S.C. § 1 was possibly decisive in the A & P Trucking case, see 358 U.S. at 123, 124, just as we believe its grandfather should be here.

Act of Feb. 11, 1835, Laws of Illinois, 1835, p. 204.[20] We need go no further. There is a strong presumption that Congress knew what it was doing and meant what it said.[21] "[T]he largest latitude consistent with the words employed . . . ." is the mandate for construction of the Act which we have from its sponsor. Rep. Shellabarger, Ohio, *Globe*, Appendix 68 (March 28, 1871). What follows merely gilds the lily. We think it irrelevant, but acknowledge the possibility that others may disagree.

(b) *What Rep. Shellabarger said.*

The relevance of the "dictionary statute" of Feb. 25, 1871 is highlighted by a statement of § 1979's sponsor, Rep. Shellabarger of Ohio:

> "... [C]ounties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States. (See *Louisville Railroad Company* v. *Letson*, 2 Howard, 497, &c.)"
>
> *Globe* 752 (April 18, 1871).

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[20] The fact that municipal corporations were commonly understood to be "bodies politic and corporate" at the time R.S. § 1979 was adopted, is demonstrated by the 58 pre-1871 statutes collected in Appendix D (pp. 107-10) to this brief.

[21] Cf. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson and Minton, J.J. concurring).

Minutes later, Shellabarger reiterated his point, saying of municipal corporations and counties that:

> "... they being, under well-recognized United States law, a person in the courts; it is perfectly competent to enforce a judgment for such a liability in the same manner as could any other judgment be enforced against the same legal person or corporation."
> *Globe* 752.[22]

(c) *What an 1873 federal court said.*

The judges of the era in which R.S. § 1979 was passed saw nothing incongruous in holding that a corporation was

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[22] Rep. Shellabarger was addressing himself to the so-called "Sherman Amendment," a grotesquely worded provision which was appended to the bill by the Senate without debate after the bill had already passed the House. The Sherman Amendment sought to make every "county, city, or parish" liable for various injuries inflicted by mobs of *private individuals*. It contained no "color of law" provision. *Globe* 705. The amendment was ultimately dropped after the House twice non-concurred. See *Globe* 725, 728, 779, 800, for the votes. Some Senators did debate the amendment after the House initially rejected it.

Opposition to the amendment centered upon the patent unconstitutionality and injustice of subjecting cities and counties to liability for the actions of private individuals whom they did not control or direct. See *Globe* 759, 762, 777, 788. Only Sen. Stevenson of Kentucky addressed himself systematically to the idea that municipalities were immune from tort liability. *Globe* 762. Sen. Stevenson also opposed the amendment on the constitutional grounds urged by the other speakers. He was paired against the bill as a whole on the final Senate vote, even though the Sherman Amendment had been dropped, and R.S. § 1981 substituted. *Globe* 831. Most of the speeches against the Sherman Amendment were made by Democrats who opposed passage of *any* bill. *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951):

> "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

a statutory "person."[23] In what appears to have been the very first reported decision construing R.S. § 1979, the Circuit Court for the Northern District of Illinois dealt with the question:

> "One of the objections made to the jurisdiction of the court is that this law refers to persons, and it is said they must be natural persons, and that—this being a statute passed under the provisions of the fourteenth amendment of the Constitution—Congress did not intend to include corporations by this language . . . .
>
> ". . . . .
>
> "Why, . . . if a corporation as such, under color of any law . . . should subject . . . any person . . . to the deprivation of any rights . . . secured by the Constitution . . . should not the individual have redress against the corporation? And yet the language of the law is 'a person,' and not a corporation. Why should a party be protected if the wrong was done by a person, and not protected if it was done by a corporation, where it is a question as to the jurisdiction of a court? Why,

[23] Holdings that corporations, both public and private, were "persons" within the meaning of various statutory and constitutional provisions were not uncommon in the years prior to 1871. See, *e.g.*, dealing with governmental bodies, Rains v. City of Oshkosh, 14 Wis. 403 (*372), 405, 406 (*372, *374) (1861); Bray v. Town of Wallingford, 20 Conn. 416, 418 (1850); Martin v. State, 24 Tex. 61, 68 (1859). Also see State v. Herold, 9 Kans. 134 (*194), 137 (*199) (1872).

This Court had firmly established the principle that a corporation might be a "person" within the meaning of various constitutional and statutory provisions, prior to 1871. See, *e.g.*, Louisville, Cincinnati & Charleston R. R. Co. v. Letson, 2 How. 497, 555, 558 (1844); Beaston v. Farmer's Bank of Delaware, 12 Pet. 102, 105 (1838); United States v. Amedy, 11 Wheat. 392, 412 (1836).

As might be expected, many states, prior to 1871, had enacted "dictionary statutes" providing that the word "person" might be construed to include "bodies politic and corporate." See the collection of pre-1871 state statutes defining "person" in Appendix E (p. 111) to this brief. Thus, it clearly appears that "person" was a word of art in 1871, just as it is today. *Cf.* United States v. A & P Trucking Co., 358 U.S. 121, 123, 124, 128 (1958).

in other words, cannot the court treat a corporation, if that does the wrong, as a person, precisely as the courts have always treated a corporation as a citizen, for the purpose of maintaining jurisdiction, where rights are affected?

"• • • •

"[I]nasmuch as I think where if the wrong was done *by* a corporation there would be a remedy under the statute, I also think that where the wrong is done *to* the corporation . . . the same right is given to the corporation."

Northwestern Fertilizing Co. v. *Hyde Park*, Fed. Cas. No. 10,336; 3 Biss. 480, 482, 483 (1873).

In a footnote, the court cited the "dictionary statute":

"See Sec. 2, Act of February 25, 1871, 16 U.S. Statutes at Large, 431." 3 Biss. at 438 note.

Although these statements of the court had reference to private corporations, it is noteworthy that the defendant in *Northwestern Fertilizing* was a municipal corporation: the Village of Hyde Park. Neither the court nor the litigants appear to have doubted that the village came within the statutory phrase "every person."[24] (As we shall show later on, the distinction between private and public corporations which seems so clear today, was somewhat blurred in the minds of many lawyers during the Civil War era. See pages 47-48 of this brief.)

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[24] It was quickly established that a corporation is a "person" for purposes of the due process clause of the fourteenth amendment. Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394, 396 (1886). See the extended discussion in The Railroad Tax Cases, 13 Fed. 722, 757-61 (C.C.D.Cal. 1882).

(d) *What this Court, by necessary implication, has held.*

In a number of cases this Court has held that municipal corporations are within the terms of R.S. § 1979. See, for example, *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) and *Douglas* v. *City of Jeannette*, 319 U.S. 157, 161 (1943). These were equity cases and "sovereign immunity" was not discussed. But, necessarily, these cases hold that a municipal corporation is within the phrase "every person," because otherwise no cause of action under R.S. § 1979 would exist.

Section 1979 gives "an action at law, suit in equity, or other proper proceeding for redress" against "every person" who violates the Constitution under color of law. Thus, the equitable relief portion of § 1979 modifies *the very words*—"every person"—which the "action at law" provision invoked in the case at bar modifies. In the light of the policy considerations discussed in the next section of this brief, as well as the congressional mandate for liberal interpretation of the Act, we suggest that this Court should not hold that the identical words in § 1979 mean one thing in equity and something else at law, because such a holding would hurt injured plaintiffs, not help them.

It is perhaps relevant to note that in other areas of federal legislation this Court has held governmental bodies to be "persons." *Plumbers of Local* 298 v. *County of Door, a Municipal Corporation*, 359 U.S. 354, 359 (1959); *California* v. *United States*, 320 U.S. 577, 585 (1944); *Georgia* v. *Evans*, 316 U.S. 159, 162 (1942); *Ohio* v. *Helvering*, 292 U.S. 360, 370-71 (1934); *Metropolitan R. Co.* v. *District of Columbia*, 132 U.S. 1, 10 (1889). Indeed, this Court has gone so far as to construe "person" in a *crim-*

inal statute to include "an amorphous group of individuals" which was not a legal entity. *United States* v. *Shirey*, 359 U.S. 255, 257 (1959).[25]

It may be that the foregoing arguments are not conclusive as to municipal liability under R.S. § 1979. But, at least, we think it reasonable to assert that they open the door to consideration of the policy questions which inhere in this issue of statutory construction. We suggest that the history and wisdom of the sovereign immunity doctrine is, at this point, relevant.

C. ALL DOUBTS AS TO THE LIABILITY OF THE CITY UNDER THE ACT SHOULD BE RESOLVED IN PETITIONERS' FAVOR BECAUSE THE DOCTRINE OF IMMUNITY IS NOT WELL GROUNDED IN HISTORY OR REASON.

Considerations of public policy should be influential in construing the generalities of R.S. § 1979. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), this Court held that state legislators, acting within the scope of their duties, were immune from liability under § 1979. In so holding, the majority opinion laid heavy emphasis upon "[t]he reason for the privilege" and the fact that legislative immunity

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[25] "Whether the word 'person' in a particular statute includes a particular body, a corporation, or association is essentially a matter of construction of that statute, *aided, where possible, by general statutory definitions*. If the purpose of a statute is such as to dictate the inclusion of a particular body within its scope then the statute is generally so interpreted." 359 U.S. at 257 n. 2 (Emphasis supplied).

It is of possible significance that, in enacting R.S. § 1979, Congress did *not* deem it necessary explicitly to add "firm" and "corporation" to secure the inclusion of these entities. *Cf.* United States v. Shirey, 359 U.S. at 269 (dissenting opinion); Georgia v. Evans, 316 U.S. 159, 163-64 (1942) (dissenting opinion).

stemmed from "a tradition . . . well grounded in history and reason . . . ." 341 U.S. at 373, 376. Justice Black, concurring, again noted that the legislative privilege was based on a "long-standing and wise tradition. . . ." 341 U.S. at 379.

We shall show that the doctrine of sovereign immunity, as applied to municipal corporations, is a "tradition" neither long-standing nor wise. It is "well grounded" neither in history nor in reason.

1. The Rule of Immunity Is Not Well Grounded in Reason.

The City's burden of persuasion to show that it is exempt from the operation of § 1979, becomes almost impossible when the inherent injustice of municipal immunity is considered in the light of the function and purpose of the fourteenth amendment.

"The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong'. . . ." Borchard, "Government Liability in Tort," 34 *Yale L.J.* 1 (1924). Of course, this "reason" is in the teeth of our public philosophy. The fourteenth amendment and the bill of rights were passed on the precise theory that the King (or the Government) *can* do wrong and must be inhibited by legally enforceable guarantees.[26]

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[26] The very basic conflict as to the nature of "sovereignty" between those who believe in the rights of man and those who do not, is illustrated by a colloquy which took place during the Japanese Privy Council debate on adoption of the Imperial Constitution of 1890. The chairman and a councillor, Mr. Mori, are speaking:

"Mr. Mori (with an air of indignation): 'Chairman! I object to the wording 'the rights . . . of the subjects.' It is repugnant to our national tradition. We Japanese subjects may be bestowed with limited status of responsibility to the Emporer, but never with rights.' (Footnote cont., p. 36.)

"Prince Ito (calmly): 'Your argument rejects the theories constitutional law. A main objective of making a constitution

America has no King. And if it ever had a public policy of municipal irresponsibility, that policy is discredited and the doctrine is everywhere dying or dead. We have seen too much in the Twentieth Century of the grim results of the exalted power of irresponsible government in Europe and Asia, to be indifferent to the moral issues raised by the imumnity rule. The seathing attack by Professor Borchard, in which every conceivable justification for the rule's continued existence was conclusively refuted, has done its work.[26a] The unaccustomed fervor of published denunciation of the rule by conservative courts and commentators is but a reflection of a deeply felt necessity of our times that justice be done and the callous formulas of other days

(Footnote 26 continued)

exists, in the first place, in the limitation of the sovereign power, and secondly in the protection of the people's rights. If not so, the sovereign will have infinite and uncontrolled power, whereas the people will owe unlimited responsibility to it. Such is an absolute monarchy. If we eliminate the bill of rights from the constitution, how can it be a protector of our people?"

Haruo Abe, "Some Observations on the Protection of Human Rights against Illegal Criminal Investigation in Japan," —— J. Crim. L., C. & P.S. ——, —— (1960) (Article scheduled for publication within the next year; manuscript available at the office of Prof. Claude Sowle, Northwestern University College of Law; the quotation appears at p. 3 n. 2 of the manuscript).

Things have changed in Japan. The State may now be sued for damages for wrongful police actions. Constitution of Japan, Art. 17 (1946); State Liability Law (Law No. 125, Oct. 27, 1947). Sixty-nine such civil damage actions were brought by Japanese citizens between October 1947 and April 1954. Abe manuscript, p. 22.

These changes are said to have resulted from [t]he bitter memory of police brutality in pre-war Japan . . . " Abe manuscript, p. 16. Now the Japanese say:

"Allow the police seven miles and they will go nine miles; therefore, if we want to keep them at seven miles, better give them six miles."

Abe manuscript, p. 21.

[26a] See Borchard, 34 Yale L. J. 1, 129, 229 (1924-25); 36 Yale L. J. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928); 20 A.B.A.J. 747 (1934).

be not allowed to strait-jacket the judicial process. Thus, Dean Harno:

> "The rule is socially indefensible . . . . All the reasons . . . advanced for upholding it are fallacious . . . the courts should cease dealing in empty fictions and substitute therefor good sense."
>
> Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L.Q. 28, 31 (1921).

Thus, the Florida Supreme Court:

> "To continue to endow [the municipal corporation] with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice."
>
> *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

Thus, the Illinois and New Mexico Supreme Courts:

> "The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age . . . the medieval absolutism supposed to be implicit in the maxim, 'the king can do no wrong,' should exempt the various branches of the government from liability for their torts . . . ."
>
> *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11, 21 (1959), quoting *Barker* v. *City of Santa Fe*, 47 N.M. 85, 88, 136 P. 2d 480, 482 (1943).

Thus, in more measured terms, a West German lawyer who has lived under more than one form of twentieth century government:

> "For a foreigner it is somewhat astonishing to see how little responsibility the state has assumed . . . in the United States. In this country, where civil liberties are usually guarded with so much jealousy . . . the citizens' remedies against the government for torts are far inferior to those afforded . . . in other countries . . . .

"What justification is there . . .? . . . [H]ow can it be justified that one innocent individual should bear the injury tortiously inflicted upon him in the course of activities for the benefit of the state? It is difficult to see why he alone should suffer merely on the ground that his interest happened to stand in the way of a governmental employee's actions. Should he not enjoy equal protection of the law with every other member of the community? . . . [I]t seems unfair . . . ."

Rolf Braband, "Liability in Tort of the Government and Its Employees: A Comparative Analysis with Emphasis on German Law," 33 *N.Y.U.L. Rev.* 18, 48-49 (1958).[27]

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[27] Compare the statement by the Chief of the Berlin Criminal Police in 1934, quoted in Kaufmann, *Der Polizeiliche Eingriff in Freiheiten und Rechte* [The Police Encroachment upon Liberties and Rights] Frankfort/Main 78 (1951). In commenting upon a Weimar Republic court decision which held that arrested persons must be promptly brought before a magistrate in accordance with a Code requirement that such production be "without delay," the Nazi Chief said,

> "that an end had to be put to the excessive esteem of individualistic interests and neglect of collectivistic interests which had carried fatal irresolution into the ranks of the police, hamstringing many of them in the impetus of the first action. Not only had the constitutional protection of the right of liberty to be take into account, but much the more so the State's general interest in the interpretation of the words 'without delay.' For this very reason the arrestee would often have to put up with a police detention in excess of the 24-hours limit. On this a clear legal rule must be demanded."

Compare the statement of Edgar E. Scott, Deputy Chief of Police and Chief of Detectives of the Metropolitan Police Dept. of Washington, D.C., with reference to Mallory v. United States, 354 U.S. 449 (1957):

> "Now, some of the people who seem to be afraid of remedial legislation have been screaming about the Constitution, due process of law, the Bill of Rights, and probable cause, and so forth, the truth is, of course, that none of these things are involved in the Mallory decision. The only thing involved is the interpretation of Rule 5(a). Such references to rights which we all hold sacred become excellent tools in the hands of those who would throw up a smoke-screen to obscure the real issue here.

[Footnote cont. p. 39]

Thirty years ago, the trend was already apparent:

> An overwhelming opinion throughout the world in favor of the assumption of community liability for the torts of public officers may be regarded as representing a growing moral conviction to which the courts should not remain impervious."
>
> Comment, "Municipal Responsibility for the Torts of Policemen." 42 *Yale L. J.* 241, 244-45 (1932).

Thirty-three scholarly books and articles attacking the injustice of the immunity doctrine were massed in support of this statement. 42 *Yale L. J.* at 244-45 n.17. Dozens more, published between 1932 and 1942, are collected in Repko, "American Legal Commentary on the Doctrine of Municipal Tort Liability," 9 *Law & Contemp. Prob.* 214 (1942). More recent additions to this flood of criticism are collected in Smith, "Municipal Tort Liability," 48 *Mich. L. Rev.* 41 (1949). Professors Fuller and Casner of the Harvard Law School have appropriately concluded:

> "Legal scholars . . . have long since made it plain that sovereign immunity has no proper place in the life of a municipal corporation."
>
> Fuller & Casner, "Municipal Tort Liability in Operation," 54 *Harv. L. Rev.* 437 (1941).

This Court has itself been astute in construing statutes to avoid the unjust consequences of sovereign immunity, noting a "steadily growing policy of governmental liability"

(Footnote 27 continued)

> "I personally, think it would be well to examine some of these persons to see what selfish interest they might have in seeking to make it easy to get criminals off."
>
> "Confessions and Police Detentions," Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. at 125 (1958).

When responsible police leaders take such attitudes as this, right out in public, the importance of a meaningful civil remedy—which means municipal responsibility—becomes evident.

resulting from "expanding conceptions of public morality regarding governmental responsibility . . . ." *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 279 (1959); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 396 (1939).

The reasons for this universal condemnation are clear enough: (a) immunity is unjust to the individual victim of a municipal tort; (b) immunity is unjust to the individual employee who commits a municipal tort; (c) immunity is unjust to the community as a whole.

(a) *Immunity is unjust to the individual victim of a municipal tort.*

The community receives the benefits of municipal operations, "governmental" or otherwise.[28] It should therefore pay the cost and spread the risk of injury from torts resulting from such municipal operations. To throw the entire burden upon the innocent, injured individual is unreasonable, unjust, and bad social policy:

> "It is absolutely certain that in connection with their functioning, the state and each of its subdivisions will injure a certain number of individuals. The burden of this injury should be considered a legitimate public expense, incidental to carrying on the complicated public functions."
>
> Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 *Law and Contemp. Prob.* 181, 213 (1942).

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[28] " . . . the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'nongovernmental'—'governmental' quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

Indian Towing Company v. United States, 350 U.S. 61, 65 (1955).

(b) *Immunity is unjust to the individual employee who commits a municipal tort.*

The doctrine of immunity frequently operates with almost incredible harshness upon individual officers:

> "This burden, under modern conditions, should not be borne by the officer, for many reasons—the fact that his fault may be very slight and yet the results may be very serious, a situation which will mean injustice to either the officer or the injured person unless the responsibility is borne by the government: the fact that even if the officer is greatly at fault, it does not follow that he is solely so, or that the government should disclaim responsibility for his acts . . . ."
>
> Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 *Law & Contemp. Prob.* 181, 213 (1942).

This last point is of particular significance when the institutionalized nature of civil liberties violations by metropolitan police departments is noted. See, for example, *Secret Detention by the Chicago Police: A Report by the American Civil Liberties Union, Free Press, Glencoe* (1959) (20,000 illegal incommunicado detentions in Chicago in 1956); Comment, "Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy," 47 Nw. U.L. Rev. 493, 497 (1952) (4,593 unconstitutional searches and seizures exposed *in one branch* of the Municipal Court of Chicago in 1950).

The most frightening thing about what happened to the Monroe family is *not* that they were terrorized by bad men who bore ill will against them. The sobering truth of the matter is precisely that what was done to the Monroes was

done almost casually—as part of a routine investigation. This case portrays a standard police procedure—whose victims are often innocent. This case is, among other things, a "custom or usage" case.[29]

(c) *Immunity is unjust to the community as a whole.*

It cannot be denied that the citizens who live in a city have a significant interest in their police department's operating in accord with the Constitution. If there were no such interest, we would not, with such endless pains and tribulation, have articulated in our basic public document the rights of man. These rights, of course, mean nothing if they are confined to paper. They must be lived, or they are worthless. This means that violations must not occur, not merely that they must be redressed.

Imposition of municipal liability applies deterrent pressures at the only level where they can be truly effective—the level of policy decision and command. If the City must pay for the wrongful acts of its agents, the public will quickly know of it. The resultant pressures will be reflected in the policy decisions and command performance of those who govern the City and rule its police department. Disciplinary controls will be exercised at the top—the level where it really counts in a modern big city police department which more nearly resembles a large business corporation than it does an old fashioned town constabulary. Things will change. Not only will past in-

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[29] Compare Paulsen, "Safeguards in the Law of Search and Seizure," 52 *Nw. U.L. Rev.*, 65, 75-76 (1957), with regard to the Los Angeles practice of "bugging" private homes:

> "This police conduct is not only an example of illegality, it is illegality elaborately planned with the connivance of the Los Angeles Chief of Police. It is not the case of the over-eager rookie misjudging the fine lines of the law of arrest. It is constitutional violation as a matter of police policy."

justice be redressed, but, far more important, future injustice will be prevented. "The purpose of the law . . . is to prevent such misconduct, not to put a price on it." *Secret Detention by the Chicago Police*, supra, at 17.[39]

* * * *

Professor Caleb Foote has, with specific reference to police violations of individual rights, summarized all three reasons for municipal liability in one paragraph:

> "Governmental liability is important not only to provide financially responsible Defendants, but primarily so that the deterrent will be effective where it is needed —at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill tempered or dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force. Most illegal arrests and searches probably arise within the scope of everyday police activity, a fact recognized by cities which allow the city attorney to defend officers sued for false imprisonment. Where the officer makes an illegal arrest under the orders of his superiors, while this may not excuse him, evidence of the fact will be admissible in mitigation of damages. However justifiable this may be as an act of justice to the Defendant, it should be irrelevant to the Plaintiff's cause of action and illustrates the desirability of enforcing the sanction at the policymaking level. Furthermore, some police illegality is an inevitable concomitant of law enforcement. The ex-

[39] It is worth recalling that Entick v. Carrington, 19 How. St. Tr. col. 1029 (1765) and the associated damage actions *stopped short* the use of the general warrant in England—and that Parliament paid the damages for constitutional violations committed pursuant to a long established English custom of searches under the general warrants. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 45, 48-50 (1937).

pense should be borne by the state, which can spread the loss where actual monetary damage results and which is in the position to control and minimize the risk."

Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493, 514 (1955).

Lon Fuller and Andrew Casner made the same point with interesting variations:

"One of the standard objections to municipal liability is that such a doctrine would tend to eliminate the officer's feeling of personal responsibility. But should the officer be judgment proof, the incentives to non-tortious conduct are in no way affected by municipal liability. Even when a judgment against him is collectible, his feeling of personal responsibility may persist despite the imposition of liability upon the municipality, for he is still subject to an action over brought by the city. In any event, the proper method for developing incentives to non-tortious conduct is through adequate administrative supervision . . . . Public safety becomes a matter of real concern to the city fathers when the city is liable for its torts . . . ."

Fuller & Casner, "Municipal Tort Liability in Operation," 54 *Harv. L. Rev.* 437, 459 (1941).

Dean Leon Green has summed up the policy factors at stake:

"There is no good reason why the basis of liability applicable to private corporations should not give municipal corporations all the protection they require. The defenses available are extensive and no one can contend that they are not ably presented and consistently upheld by the courts. Even in the most extreme case, that of injuries inflicted by police officers, the protective doctrines are adequate. If the officer is not on duty, as in the recent case of the shooting of a

sailor by two city policemen, the city is protected by the 'scope of employment' doctrine. On the other hand, if it were found that a policeman while on duty, as in the recent case of shooting a Negro boy in the back, did so either negligently or wantonly, why should the city not pay for the harm done as would a private employer? Why should the victim be required to bear the injury while the city does nothing to atone for the conduct of its unfit employee? Incidentally, if a city in such a case were held responsible, how long would it be before municipalities everywhere would be taking the same attitude towards the quality of their personnel that must be taken by private companies? The opportunity offered through civil actions for making indifferent city governments responsive to their duties is staggering."

Green, "Freedom of Litigation—Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 377 (1944).

The conclusion is apparent:

"There is no way of assuring a maximum of justice and a minimum of suffering except by the assumption of responsibility by the unit of government."

Blachly and Oatman, "Approaches to Government Liability in Tort: A Comparative Survey," 9 *Law & Contemp. Prob.* 181, 213 (1942).

2. The Rule of Immunity Is Not Well Grounded In History.

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court read into R.S. §1979 a rule of legislative privilege, because that rule was ". . . well grounded in history and reason . . . ." 341 U.S. at 376. We have realt with the "reason" of municipal irresponsibility for torts. We turn to irresponsibility's history.

Revised Statutes §1979 was passed in 1871. 17 stat. 13.

In order to assume that Congress intended, *sub silentio*, to immunize municipal corporations from liability under the Civil Rights Act of 1871, it must be first assumed that there existed at the time the Act was passed, a well-established, universally recognized American common law rule of municipal immunity which constituted one of the basic "presuppositions of our political history," *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951). Municipal immunity constituted no such thing. The modern supposition that municipal immunity was a fixture of American law from the beginning is common, but baseless. As Dean Green put it:

> "I was surprised to find this turn in legal doctrine, for I had assumed that immunity was recognized from the beginning . . . ."
>
> Green, "Freedom of Litigation (III): Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 359 (1944).

We do not contend that the pre-1871 law was clearly and universally in our favor on the issue of municipal liability. What we suggest is that the pre-1871 law on this issue was for the most part a hodge-podge of conflicting and unanalyzed *ipse dixits*. The non-governmental—governmental' quagmire" (*Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955)) had not yet, to mix a metaphor, attained the strangle-hold on the nineteenth century judicial imagination which it later achieved.[31]

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[31] An early New York dictum did elaborate such a distinction and carve out an area of municipal immunity in the performance of "Governmental functions." Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (1842). But the Bailey case was later repudiated on this point. See Darlington v. City of New York, 31 N.Y. 164, 200-01, 88 Am. Dec. 248, —— (1865).

This fact is not so surprising when it is noted that the distinction between private and public corporations, which is so basic to a lawyer's thought today, was still a slowly developing concept in the middle of the nineteenth century. Many lawyers still thought of all corporations as essentially public in nature. See Dodd, *American Business Corporations Until 1860*, pp. 14, 17 (1954). Thus it is not unreasonable to assume that, in the minds of many nineteenth century lawyers, public corporations and private corporations were deemed to be equally liable in tort. When the still important influence of Blackstone is recalled, this becomes even more plausible. Blackstone had completely muddled the distinction between public and private corporations:

> "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."
>
> 1 Blackstone, Commentaries, 113 (*124)(Cooley ed. 1899).

Thus, many western state judges had, at least seemingly, rejected immunity in sweeping terms which reveal no thought that cities were different from other corporations. Although most of the cases can be distinguished on their facts, the point remains that the reports abounded in sweeping declarations of liability which *seemed* to be all-inclusive.

For example, the Ohio Supreme Court, in 1831, had said:

> "Whatever may have been the ancient doctrines, with regard to the liability of corporations, for wrongs done by their agents, courts have gradually departed from them, and adopted principles more congenial to the state and condition of the world. Corporations

are established, in our country, for almost every concern of life—political, pecuniary, and eleemosynary. They govern towns, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations, they act by agents. Where benefits are derived, the corporation enjoys them. Where injury is inflicted through their means, they ought to be responsible for it . . . .

"If an individual is injured, it is right he should have redress, against all upon whose account the injury was perpetrated. There is no justice in sending him to seek redress from an irresponsible agent. There is no propriety in compelling the injured party to look for compensation to the mere agent . . .

"All corporations act by agencies, and those agencies are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case, the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it."

Goodloe v. *City of Cincinnati*, 4 Ohio 500, 513-14, 22 Am. Dec. 764, 765-66, (1831).

During the 15 years preceding 1870, Illinois had repudiated the doctrine of immunity on three occasions. In 1855, the Illinois Court held that municipalities were liable for negligence. It did not discuss whether the negligence was "governmental" or otherwise. Instead, it stressed morality:

"We not only feel authorized but required to afford the protection sought. And more especially, as we think the decision based upon sound sense in accordance with strict morality, and keeping pace with the progress of the improvements of the age."

Browning v. *City of Springfield*, 17 Ill. 143, 148 (1855).

Five years later, the court reaffirmed its position, holding that trespass would lie against a municipal corporation:

> "Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents, for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued."
>
> *Allen* v. *City of Decatur*, 23 Ill. 272, 275 (1860).

In *Nevins* v. *City of Peoria*, 41 Ill. 502 (1866), the Illinois Supreme Court again reaffirmed the rule of liability.[32]

Louisiana, prior to passage of the Civil Rights Acts, had specifically held municipalities liable for the wrongful acts of police officers. In *Johnson* v. *Municipality No. One*, 5 La. Ann. 100 (1850), the Louisiana Court affirmed a $600.00 damage judgment against a city for the illegal detention in its jail of the plaintiff's slave. The Court said:

> "The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned."
>
> 5 La. Ann. at 100.

Accord, *Baumgard* v. *Mayor*, 9 La. 119, 29 Am. Dec. 437 (1836). Also see the 32 early negligence cases imposing liability on municipalities cited in *Barnes* v. *District of Columbia*, 91 U.S. 540, 551 (1875), and the 20 such pre-1870 decisions listed in Green, "Freedom of Litigation (III): Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 358 n. 12 (1944).

On the other hand, it appears that in some of the early cases which were similar on their facts to the case at bar, the municipality had escaped liability. (If other pre-1871

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[32] It was not until 1870 that the Illinois law of municipal immunity began its evolution. See Molitor v. Kaneland Community School District, 18 Ill. 2d 11, 16 (1959).

decisions involving municipal liability for police lawlessness exist, we have been unable to find them.) See, *Stewart* v. *New Orleans*, 9 La. Ann. 461 (1854) (municipality not liable for beating a slave to death); *Dargan* v. *Mobile*, 31 Ala. 469 (1858) (municipality not liable for beating a slave to death); *Buttrick* v. *Lowell*, 1 Allen (83 Mass.) 172 (1861) (municipality not liable for beating and false arrest); *Elliott* v. *Philadelphia*, 7 Phil. 128 (1869) (negligence). But cf. *Clague* v. *New Orleans*, 13 La. Ann. 275 (1858) (municipality *is* liable for letting a slave escape from a chain gang). Contra. *Richmond* v. *Long's Adm'r*, 17 Gratt. (Va.) 375 (1867) (municipality *not* liable for letting a slave escape from a hospital).

Two facts must be noted in appraising the significance of these cases.

First: with but two exceptions, these cases were decided by slave state courts. Both *Stewart* and *Dargan* involved police brutality directed at slaves who were unlawfully assembled in groups of four or more, away from quarters. One clearly involved a curfew violation. The other probably did. It may be that the policy which led these Southern judges to immunize the cities involved, was a strong (but for obvious reasons unarticulated) desire that municipalities not be deterred from dealing with such serious offenses in any way they saw fit; this desire might well have stemmed from what was then an endemic and almost paranoid fear of a slave revolt.[33] Curfew violations and illegal assemblies were thus dealt with brutally and with dispatch, and this was thought

[33] *Cf.* Dollard, Caste and Class in a Southern Town 290 (Anchor Books, 3d ed. 1957); 14 Encyc. Soc. Sci., "Slavery," 84-85 (1934).

necessary and proper. Cf. *Dargan* v. *Mobile*, 31 Ala. 469, 477. But it is doubtful that such cases could have been influential with the abolitionist congresses which passed the post Civil War amendments to the Constitution, and the Civil Rights Acts. It would be ironic indeed if slave cases were to control construction of the Civil Rights Act in 1960.

Second: The basic theory of the Northern cases, seems to have been that the wilful acts of the policemen were not the acts of the city, because in committing them the officer did not represent the city—thus his act was not the city's act, and *respondeat superior* did not apply. See *II Dillon, Municipal Corporation*, §§ 772-73 (1st ed. 1872).[34] The focus of the cases seem to be *not* on immunity (the word is never used), but on *ultra vires* and scope of employment. At this point the philosophy of the cases collides head on with the philosophy of the fourteenth amendment and the civil rights legislation. There is no longer any doubt that when an officer of the state is engaged in his official duties, his act is the state's act for purposes of the fourteenth amendment and for purposes of the Civil Rights Act. *Screws* v. *United States*, 325 U.S. 91 (1945); *Williams* v. *United States*, 341 U.S. 97 (1951). Obsolete ultra vires or scope notions cannot control. If Congress had intended to incorporate such hair-splitting refinements in the law of agency as some of these old cases reveal, it chose a poor phrase when it outlawed actions committed

[34] The decisions not listed above, which are cited by Dillon in § 773 (police torts) of his treatise, are distinguishable on their facts from the case at bar. Thus, in Pesterfield v. Vickers; 3 Cold. (Tenn.) 205 (1866), the acts of an independently elected city marshal and a judicial officer were involved. The defendant mayor and aldermen thus had no direct control over the wrongdoers. Dillon himself distinguishes Atwater [*Sic.* "Altvater"] v. Baltimore, 31 Md. 462 (1869) (see II Dillon, § 773 n. 1) and also distinguishes the cases cited at § 773 n. 4.

"under *color of* any statute, ordinance, regulation, custom or usage . . . " R.S. § 1979.

> "Vague ideas of . . . *ultra vires* doctrine imported from private agency . . . do not nullify what four years of civil strife secured and eighty years have verified." *Screws* v. *United States*, 325 U.S. 91, 116 (1945) (concurring opinion).

We emphasize that the above discussion of pre-1871 law does not purport to be exhaustive. But it is, we submit, more than adequate to show that there was no clear-cut, universally accepted doctrine of municipal immunity in existence at the time Congress passed R.S. § 1979. This johnny-come-lately rule of injustice is *not* one of the "presuppositions of our political history." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951).

D. STATE LAW RULES OF MUNICIPAL IMMUNITY SHOULD NOT BE PERMITTED TO CONTROL THE APPLICATION OF THE FEDERAL CIVIL RIGHTS ACT, BECAUSE FEDERALLY GUARANTEED CIVIL RIGHTS SHOULD BE PROTECTED EQUALLY AND UNIFORMLY IN EVERY STATE.

This Court has never said whether rules of state law may control the question of municipal liability under R.S. § 1979.

Petitioners contend that such questions should be decided as matters of federal law, so that the Act will mean the same thing in every state, as to matters of substantive liability. Respondents claim that the law of the state where the cause of action arose should control.

Holdings in two circuits seem to side with petitioners, although the precise point was not discussed. Both cases involved, *inter alia*, damage claims which were upheld.

Burt v. *City of New York*, 156 F. 2d 791 (2d Cir. 1946) (L. Hand, J.); *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945), cert. den. 326 U.S. 721 (1945).

Dicta in four circuits support respondents. *Cuiksa* v. *City of Mansfield*, 250 F. 2d 700, 703-04 (6th Cir. 1957); *Agnew* v. *City of Compton*, 239 F. 2d 226, 230 (9th Cir. 1956); *Cobb* v. *City of Malden*, 202 F. 2d 701, 703 (1st Cir. 1953); *Charleton* v. *City of Hialeah*, 188 F. 2d 421, 422-23 (5th Cir. 1951); *Hewitt* v. *City of Jacksonville*, 188 F. 2d 423 (5th Cir. 1951). In each of these five cases, it was asserted that the state law of municipal immunity was controlling.

The first dictum came in *Charlton*. The Fifth Circuit cited no federal authority, and disposed of the issue in two paragraphs which assumed the point to be decided. The subsequent cases merely cite *Charlton* and each other. Apparently, none of the arguments presented here was considered in any of these five "state law" cases.

The great purpose of the fourteenth amendment was to secure uniform protection of fundamental liberties throughout the country. If state law is to govern questions of liability under the fourteenth amendment's enforcing legislation, then protection of civil liberties will not be equal over the nation.

This Court has pointed out that "a comparative study of the cases in the forty-eight States" on municipal immunity "will disclose an irreconcilable conflict." "More than that," the Court continued, "the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co.* v. *United States*,

350 U.S. 61, 65 (1955). Here, as in *Indian Towing*, absorption of state law on municipal immunity will lead the federal courts straight into the "'non governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." 350 U.S. at 65.

New York has abolished municipal immunity for police torts. So has Florida. *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (1957). So, as of Dec. 16, 1959, has Illinois. Compare *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11 (1959) with *Peters* v. *Bellinger*, 19 Ill. 2d 367 (1960). But many other states hold to the contrary.

If in adopting the Civil Rights Act, "Congress has declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process," (Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 *Law & Contemp. Prob.* 216, 230 (1948)), it seems unreasonable for liability under the Act to depend upon the vagaries of state common or statutory law.

> "Federal law is no judicial chameleon, changing complexion to match that of each state . . ."
>
> *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 471-72 (1942),

Well established principles evolved by this Court in other areas of federal law strongly support petitioners' contentions here.

> "We must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the Federal Act dependent on state law. That assumption is based on the fact that the application of Federal legislation is nation-wide . . . and at times on the fact that the Federal program would be impaired if state law were to control . . . ."
>
> *Jerome* v. *United States*, 318 U.S. 101, 104 (1943).

This Court has thus made it clear that, while municipal immunity may be a good defense in a state law case, it is not available in federal courts when federally sanctioned rights are involved.

The leading case is *Workman* v. *New York City*, 179 U.S. 552 (1900). There plaintiff's vessel had been struck by a New York City fire boat. Plaintiff sought damages against the city. At every stage, the city pleaded sovereign immunity.

The Court of Appeals held, and this Court assumed, that under New York law as it then stood, the city was immune from damage liability in suits arising from its "governmental" activities. Both courts viewed the activity in question (operation of a municipal fire boat en route to a fire) as "governmental" under New York law. Thus, this Court described the opinion below as holding that:

> "The City, in the operation of the fire boat, performed a governmental, and not a corporate, function . . . [T]herefore, under the assumption that the [New York] decisions . . . were authoritatively controlling, [the Court of Appeals] held the City not liable."
>
> 179 U.S. at 557.

This Court reversed. After summarizing the opposing argument (179 U.S. at 557-58) it held that the City was liable. 179 U.S. at 574. The reasons are applicable here.

The *Workman* opinion observed that the law of sovereign immunity varied from state to state. If local doctrines of immunity were to be engrafted onto the federal law, said the Court, it would follow that:

> "Such law would be necessarily one thing in one state and one in another . . . would be one thing to-day and another thing to-morrow."
>
> 179 U.S. at 558.

The Court went on to point out:

> ". . . [I]f the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution."
>
> 179 U.S. at 558.

Not only would all "symmetry" and uniformity in the protection of federally sanctioned rights be destroyed, said the Court, but the federal law "which would survive would have imbedded in it a denial of justice." 179 U.S. at 559. This, continues the opinion,

> "must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor."
>
> 179 U.S. at 559.

The anomalies latent in the proposition that the local law of municipal immunity is part and parcel of the Civil Rights Act are strikingly illustrated by the construction of the Act in *Charlton* v. *City of Hialeah*, 188 F. 2d 421 (5th Cir. 1951) in the context of changing Florida and Illinois law.

At the time of *Charlton*, Florida law immunized cities from suits arising out of police torts. *City of Miami* v. *Bethel*, 65 So. 2d 34 (1953). Therefore, the *Charlton* court thought a Florida city immune under the Civil Rights Act. But in 1957, the Supreme Court of Florida overruled the *City of Miami* case, saying:

> "Affirmatively we hold that a municipal corporation may be held for the torts of police officers under the doctrine of *respondeat superior*."
>
> *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130, 133 (1957).

At the time the police invaded the Monroe home, Illinois law immunized cities from suits arising out of police torts. *Taylor* v. *City of Berwyn*, 372 Ill. 124 (1939). Therefore, under the Charlton rule, an Illinois city would be immune under the Civil Rights Act. But on Dec. 16, 1959, the Supreme Court of Illinois overruled the immunity doctrine, giving its decision "prospective only" operation. *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11.

Thus, if the "state law" contention of respondents here is accepted, and the reasoning of *Workman* ignored, the following conclusions must necessarily be true:

1. The City of Hialeah was not a "person" subject to suit in 1951, but is one now.
2. The City of Chicago was not a "person" subject to suit at the time of the Monroe search, but is one now.
3. At the time of the Monroe search, the City of Hialeah was a "person" subject to suit, but the City of Chicago was not.
4. Today, both Chicago and Hialeah are "persons" subject to suit, but cities in many other states are not.

All of these results would seemingly flow from the proposition that state law should control the operation of the federal act. This is just the sort of inconsistency which the Court foresaw in *Workman*. We therefore suggest that the *Workman* rule should be applied here.

The rule in *Workman* is over 50 years old. It has stood the test of time.[35] See e.g., *United States* v. *Port of Port-*

[35] Ex Parte New York, No. 1, 256 U.S. 490 (1921) and Ex Parte New York, No. 2, 256 U.S. 503 (1921) are distinguishable. No. 1 is an eleventh amendment case; probably No. 2 is also. And No. 2 involved an attempt to *attach* "property and revenue necessary for the exercise" of governmental functions by a *state*. 256 U.S. at 511.

land, 300 Fed. 724, 726 (9th Cir. 1924); *City of Chicago* v. *White Transp. Co.*, 243 Fed. 358 (7th Cir. 1917); *In Re Nueces County, Texas*, 174 F. Supp. 846, 850 (S.D. Tex. 1959); *Steel All Welded Boat Co.* v. *City of Boston*, 18 F. Supp. 421 (D. Mass. 1937).

The *Workman* principle has been extended to many other areas of Federal law. See e.g., *Frame* v. *City of New York*, 34 F. Supp. 194 (S.D.N.Y. 194 (Jones Act); *United States* v. *City of New York*, 82 F. 2d 242 (2d Cir. 1936) (Damage action under Federal Tax Lien Act).

For these reasons, petitioners suggest that it would be unsound for this Court to engraft upon the Federal Civil Rights Act the fluctuating and inconsistent standards of state law which, as this Court has pointed out, in many cases work "a denial of justice." *Workman* v. *New York City*, 179 U.S. 552, 559 (1900).

E. THE FEDERAL COURTS WILL NOT BE SERIOUSLY INCONVENIENCED BY SUITS TO REDRESS VIOLATIONS OF CONSTITUTIONAL RIGHTS, IF CITIES ARE HELD LIABLE.

It is thought that one of the unarticulated reasons for rejection of jurisdiction by the courts below was the fear that acceptance of jurisdiction would result in the federal courts being inconvenienced by large numbers of cases of this type.

This fear is not sustained by experience.

Only 36 suits under the Civil Rights Act against police officers have been reported in the Federal Reports since *Hague* v. *CIO*, 307 U.S. 496 (1939), was decided by this Court. (See our Petition for Certiorari, pp. 34-35).

Chronologically, the reported decisions are distributed as follows (including duplications where the case was reported more than once):

1939—1	1950—5
1940—0	1951—2
1941—0	1952—3
1942—0	1953—3
1943—0	1954—2
1944—1	1955—5
1945—1	1956—2
1946—0	1957—3
1947—2	1958—6
1948—1	1959—5
1949—3	

Picking v. *Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945), a very broad case from whose liberal doctrines the lower federal courts have been beating a consistent retreat, did not result in a flood of cases. There are only four reported cases in the Third Circuit (see Petition for Certiorari, 38), all for damages, and in every one of which the complaint has been sustained.

There have been only eight reported cases in the Fifth Circuit since 1952 (Petition for Certiorari, 39-40), and only seven in the Seventh Circuit since 1953. (Petition for Certiorari, 41-42). There have never been any cases reported in the First, Tenth, or District of Columbia Circuits. (Petition for Certiorari 37, 43).

We are unable, of course, to say what numbers of cases are pending *nisi prius* in the district courts. It is our impression that in the district court in Chicago, the number filed since 1939, and the number pending now, are relatively insignificant.

An index to the possible increase in case load resulting from acceptance of these cases by the federal courts may be the volume of cases filed in the state courts for police torts arising out of false arrest and imprisonment and malicious prosecution.

Although the law is perfectly clear that every arrest and imprisonment is presumptively tortious and must be affirmatively justified, only a very small number of cases seem to be filed. A negligible number come to the state courts of review. In the past ten years, only five such cases are reported from the Illinois Appellate Court, and only one from the Illinois Supreme Court.[36]

An attempt to determine the incidence of such suits was made by sending letters of inquiry to 54 of the largest cities of the United States. Some 19 responses have been received up to the date of printing this brief. A table of the cities queried and their reports as to the number of suits filed within the past twelve months follows. (The letters of response are being lodged with the Clerk of this Court, and copies have been, and from time to time as new letters come in will be, supplied to respondents' counsel).

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[36] Fulford v. O'Connor, 3 Ill. 2d 490 (1954), Shemaitis v. Froemke, 12 Ill. App. 2d 231 (1956); Watkins v. Sullivan, 11 Ill. App. 2d 134 (1956); Sparacino v. Ferona, 1 Ill. App. 2d 227 (1954); Aldridge v. Fox, 348 Ill. App. 96 (1952); Raucci v. Connelly, 340 Ill. App. 280 (1950).

City	*Suits Filed Within Past Twelve Months*
Atlanta, Ga.	No response.
Baltimore, Md.	" "
Birmingham, Ala.	" "
Boston, Mass.	" "
Buffalo, N.Y.	" "
Charleston, S.C.	" "
Charlotte, N.C.	1 suit within ". . . past several years."
Cincinnati, Ohio	1 suit in 1959.
Cleveland, Ohio	No response.
Columbus, Ohio	2 suits. (". . . average . . . .")
Dallas, Texas	No response.
Denver, Colo.	2 suits. (". . . this type of situation is not a problem.")
Des Moines, Ia.	No response.
Hartford, Conn.	"Seven suits presently pending."
Honolulu, Ha.	No response.
Houston, Texas	" "
Indianapolis, Ind.	" "
Jackson, Miss.	" "
Jacksonville, Fla.	" "
Jersey City, N.J.	" "
Kansas City, Mo.	"No suits filed."
Los Angeles, Cal.	No response.
Memphis, Tenn.	" "
Miami, Fla.	" "
Milwaukee, Wisconsin	9 cases 58-59 fiscal year. 9 cases 59-60 fiscal year.
Minneapolis, Minn.	No response.
Mobile, Ala.	" "
Montgomery, Ala.	" "
New Bedford, Mass.	" "
New Orleans, La.	" "
New York, N.Y.	" "
Newark, N.J.	" "
Oklahoma City, Okla.	1 suit.

Omaha, Neb.	1 suit (". . . very few . . . .")
Philadelphia, Pa.	No response.
Phoenix, Ariz.	No response.
Pittsburgh, Pa.	No response.
Portland, Maine	"No cases in 15 years."
Portland, Oregon	No response.
Providence, R.I.	" "
Reno, Nev.	"No cases."
Richmond, Va.	No response.
Rochester, N.Y.	9 suits.
St. Louis, Mo.	No response.
St. Paul, Minn.	"No suits."
Sacramento, Cal.	No response.
Salt Lake City, Utah	"No suits."
San Francisco, Calif.	No response.
Seattle, Wash.	"
Spokane, Wash.	"2 cases in 10 years."
Syracuse, N.Y.	No response.
Tulsa, Okla.	"No suits."
Washington, D.C.	"3 suits," no change in volume.
Wichita, Kan.	"No suits."

Thus even in Chicago "which probably has the worst [police] department of any sizeable city" (Life Magazine, Sept. 16, 1957, p. 71), only 31 suits were filed in 1959, although the Police Department made "two hundred seven thousand physical arrests . . . ." in 1959. See 1959 Annual Report, City of Chicago, Department of Law 29 (a copy of this report has been lodged with the Clerk). We are informed that under the administration of Professor O. W. Wilson, Chicago's new police superintendent, the rate of filing such suits has shown a marked drop.

There are eight federal district judges in the Northern District of Illinois. Thus, even for 1959, the load would have averaged less than four cases to a judge, assuming that all the cases had been filed in federal court as civil rights cases.

Since illegal searches and seizures and police brutality do not arise out of negligence, but are peculiarly a reflection of the policies and attitudes in the top echelons of a police department, it is inevitable that holding the municipality and the misfeasant officers to vigorous account will result in a change in such policies and attitudes.[37] The intransigence of the English courts in the Cases of the General Warrants put an abrupt and permanent stop to illegal searches and seizures in Britain. "The cause of public liberty had been vindicated, and was henceforth secure." 2 May, *Constitutional History of England*: 1760-1860 252 (1874).

It also seems clear that this Court's refusal to immunize cities from liability under R. S. § 1979 would not result in imposing any substantial financial hardship upon American municipalities. A recently published article in the Northwestern University Law Review is instructive on this question:

> "The fear is often expressed that the complete abolition of sovereign immunity will result in bankrupt municipalities. Such a fear, however, is not borne out by statistics. In 1958 the city of Chicago disposed of 890 personal injury cases with a total expenditure of 1.6 million dollars. This represents a per capita expenditure of approximately 40 cents per year. An overwhelming number of cases against the city are settled before the trial stage. The efficiency of the legal staff in seeking out inflated claims is evidenced by the fact that damages actually recovered amounted to only 8.5% of the total sought. Street and sidewalk claims, which constitute the majority of claims against municipalities, accounted for slightly over one million dollars or about 20 cents per capita. In the same year, street and sidewalk claims against the city of Los Angeles amounted to only 10 cents per capita. Evans-

[37] Compare the letter dated August 15, 1960, from the Law Department of Oklahoma City, which has been lodged with the Clerk.

ton, Illinois is a considerably smaller city, having a population of about 75,000. However, in the years 1954-1958 the average yearly expenditure for tort claims was $12,162 representing a per capita expense of only 16 cents per year. Employing a one man legal staff, this city was able to reduce payments to only 9% of the total sought. A New York survey indicates that damages are generally greater for smaller towns, but even for the smallest class villages in the year 1953 total damages for all torts averaged only 22 cents per capita. Absent a disaster brought about by the negligence of the municipality it would appear that even the smallest towns need not fear tort judgments, and limited liability for the smaller towns could protect against even this occurrence. The abolition of the partial immunity of the municipality would seem to work no great depletion of public funds."

Comment, "Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction," 54 *Nw. U. L. Rev.* 588, 602-03 (1959).

The 1959 Annual Report of the City of Chicago's Law Department, which petitioners have lodged with the Clerk, reveals, at pages 44-45, that the situation has not materially changed since the Northwestern article appeared. Last year the Torts Division of the City Law Department disposed of 899 cases. The cost to the City averaged $1,657.00 per case.

It is worth noting that in the same Report, the Law Department acknowledges the City's already vital role in police litigation, stating (p. 44) that ". . . to insure adequate counsel to the police officer and to keep the City's financial burden at a minimum, the City, through the Torts Division, accepts the defense of these matters."

CONCLUSION.

"We are told about crime and the need for law enforcement. We often think more in terms of detection and

punishment than in the means employed. There is no organized group, no articulate minority that keeps alive the need for protecting the accused. People whose homes are searched are the lowly, not the high. It is the unknown person who is tortured by the police. The prominent and the powerful people among us do not suffer the main invasions of privacy that take place. As Justice Black said in *Chambers* v. *Florida* (309 U.S. 227, 238), "• • • • they who have suffered most from secret and dictatorial proceedings have almost always been the poor the ignorant, the numerically weak, the friendless, and the powerless." If they are to be protected, the public opinion of the community, as well as the courts, must be enlightened.

"The means are all-important in a civilized society. It may seem unimportant that a miserable person is forced to confess to a crime. But in the sweep of history, a nation that accepts that practice as normal, . . . a people that exalts the ends over the means have no claim to a position of moral leadership among the nations."

Justice Douglas, *The Right of the People* 157 (1958).

The Monroe family may be in humble circumstances, but they know their rights, and we believe they are not powerless to defend them so long as this Court sits.

For the foregoing reasons, the judgment below should be reversed and the cause remanded with instructions that respondents be ordered to answer the complaint.

Respectfully submitted,

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APPENDIX A

MEMORANDUM ON THE HISTORIC SIGNIFICANCE OF THE INDIVIDUAL'S RIGHT TO PRIVACY IN HIS HOME, FREE FROM UNREASONABLE SEARCHES, WITH PARTICULAR ATTENTION TO:

(1) THE CASE OF THE WRITS OF ASSISTANCE

(2) THE CASES OF THE GENERAL WARRANTS

(3) THE CONGRESSIONAL DEBATES ON R. S. § 1979.

Long before *Wolf* v. *Colorado*, 338 U.S. 25 (1949) and *Elkins* v. *United States*, 364 U.S. (Adv.) ...., 80 S. Ct. 1437 (1960), the Founding Fathers knew that when police unreasonably invaded private homes without a special warrant from a judge, they committed no ordinary offense.[1]

The tactics of George III's customs officers in searching homes and other places under color of general warrants knowns as "writs of assistance" early stimulated the American colonists to eloquent protest.

Future Chief Justice John Marshall, writing in the early days of the republic, said:

> "The right to grant special warrants was never contested, but this grant of a general warrant was deemed contrary to the principles of liberty, and was thought an engine of oppression, equally useless and vexatious,

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[1] Modern Americas are no less aware:

> "Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."

Statement by J. Edgar Hoover, quoted in Irvine v. California, 347 U.S. 128, 150 (1954) (dissenting opinion of Frankfurter, J.).

Cf., J. Edgar Hoover, "The Federal Bureau of Investigation: The Protector of Civil Liberties," 46 A.B.A.J. 835, 836, 838 (1960).

which would enable every petty officer of the customs to gratify his resentments by harassing the most respectable men in the province."

Marshall, *American Colonies*, 377, Quoted, Quincy's Mass. Rep. 435.

In 1772, a committee of twenty-one Bostonians, headed by Samuel Adams, James Otis and Joseph Warren, having been designated at a public meeting at Faneuil Hall to draft a statement of "The Rights of the Colonists . . . as Men, as Christians, and as Subjects . . . ." reported on general searches by customs men, as follows:

"These Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy . . . . Each of these petty officers . . . is intrusted with Power more absolute and arbitrary than ought to be lodged in the hands of any man or Body of Men whatsoever; for [they are given] . . . 'full Power . . . in the day-time to go into any House, Shop, Cellar, or any other place, where any Goods, Wares or Merchandise lie concealed, or are *suspected* to lie concealed, whereof the customs . . . have not been . . . duly paid . . . and the said House . . . to search and survey . . . .'

"Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks, and Chests broke open, ravaged and plundered, by Wretches . . . whenever they are pleased to say they *suspect* there are in the House, Wares, etc. for which the Duties have not been paid . . . . By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These officers may *under color of Law* and the cloak of a general warrant, break through the sacred Rights of the Domicil . . . ."

Quoted, Quincy's Mass. Rep., pp. 466-67 (Emphasis in original, except for phrase, "color of Law.")

Even Hutchinson, the Tory Chief Justice of the King's Superior Court of Massachusetts, who in 1761 had denied Otis' plea to outlaw writs of assistance, was impelled to the wry observation that somehow the "illicit traders" of Boston had put "a notion . . . into the heads of the common people in general that these writs were contrary to their liberties as Englishmen." Letter to The Earl of Kinnoul, Oct. 27, 1765, quoted in Quincy's Mass. Rep. 415.

John Adams repeatedly said that American Independence was born the day in 1761 that Otis denounced the writs of assistance before the Superior Court. See 10 Adams' Works 247-48, 276. The Otis speech is well known to this Court (see, *e.g.*, *Frank* v. *Maryland*, 359 U.S. 360, 364, 378-80 (1959)) but, in the face of the continuing insistence by respondents that nothing *constitutional* is wrong with the police activity here involved, it bears quotation once more:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."
>
> Tudor, *Life of James Otis*, p. 66 (cited "Tudor" hereafter.)

The writs authorizing general searches of private property were, said Otis:

> "The worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principle of law that ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer."
>
> *Tudor*, p. 66.

Otis thought Magna Charta secured the fundamental right of the citizen to be free from the dread of police entering his home without special warrant, basing their entry on "bare suspicion without oath." *Tudor*, p. 67. Otis argued that an act purporting to authorize writs of assist-

ance was therefore void, quoting Lord Coke's dictum in *Dr. Bonham's Case*, 8 Co. 114a, Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), that "An act against the constitution is void." See Quincy's Mass. Rep. pp. 56, 474.[2]

This same idea was shared by at least some of the Congressmen who enacted R. S. §1979. The line from Coke to Otis to the case at bar runs true. Representative Hoar of Massachusetts, speaking in support of the law here invoked by petitioners, said in the House on March 29, 1871:

> "There came into my possession in my youth a copy of Lord Coke's Second Institute, which had belonged to James Otis, and which contained his autograph. On examining it I found certain passages underscored. For the purpose of his great argument in the case of the writs of assistance, where he dealt with all the fundamental questions of government and civil liberty, that great Isaiah of the Revolution had marked in this book, which he held in his hand when he made the argument, one passage among others.
>
> "It is the passage where Lord Coke asserts that Magna Charta is not a new grant of right, but the declaration of the old fundamental common law privileges of Englishmen. Magna Charta enumerates especially the rights, all now involved at the South, of life, personal security and private property."
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> *Globe* 322.[2a]

Contemporaneously with the American agitation against writs of assistance, the elder Pitt, in terms which have been

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[2] *Cf.*, 4 Coke, Institutes, pp. 176-77:

> "For justices of the peace to make warrants upon surmise, for breaking the houses of any subjects to search for felons or stolen goods is against Magna Charta."

[2a] Rep. Hoar's claim to ownership of Otis's copy of the *Institutes*, and his description of the markings in Otis's handwriting are independently verified by the note of Samuel Quincy, who, in 1864, published his grandfather's *Reports*. See Quincy's Mass. Rep., p. 484.

noted in this Court's opinions,[3] affirmed the Englishman's right to privacy in his home:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter;—but the King of England cannot enter; all his force does not cross the threshold of the ruined tenement."
>
> William Pitt, Earl of Chatham, quoted in 1 Cooley, *Constitutional Limitations* 611 (8th ed. 1927).

Again, it is not surprising to hear distinct echoes of Pitt as well as Otis in the utterance of those who enacted R. S. §1979:

> "Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne."
>
> Rep. Bingham, Ohio, *Globe*, Appendix 86, col. 2 (March 31, 1871).

The framers of R. S. §1979 did not confine themselves to impassioned generalities. They descended to particulars:

> "Governor Senter [of Tennessee], in his message, as we have seen, did not hesitate to charge that the men who by their official position were clothed with power to prevent and repress these troubles were in complicity with the organized, armed, and disguised authors of them.
>
> "Why, sir, it was but the other day that I was alluding to it—it may have been two weeks ago, I think it

[3] Frank v. Maryland, 359 U.S. 360, 378-79 (1959); Miller v. United States, 357 U.S. 301, 307 (1958).

> was hardly so long—a band of disguised men in the county of Rutherford, in which county is the city of Murfreesborough, went at night to the house of Wiley Kimbro, an old colored man, who was there with his family and perhaps a kinsman, and attempted to break and enter his domicile by force. While they were endeavoring to do that, the owner, under these circumstances of menace and terror, from his humble 'castle of defense' fired and killed one of the party and drove off the rest. *The man killed was found to be the constable of the district, and one of the others was the sheriff of the county.*"
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> Rep. Maynard, Tennessee, *Globe*, Appendix 309 (March 30, 1871) (Emphasis supplied).

(The same incident was again described and stressed by Rep. Butler of Massachusetts on April 4, 1871. *Globe* 445. It was again alluded to by Rep. Stevenson of Ohio. *Globe*, Appendix 299, col. 2 (April 4, 1871).)[4]

Minutes after Maynard described this incident, Rep. Garfield interrupted to ask "what are the 'rights, privileges, or immunities' alluded to" in the pending bill.[5] Congressman Maynard responded:

> "I suppose it embraces all privileges and immunities secured by the Constitution; for example, . . . any of the personal rights which the Constitution guarantees to the citizen—freedom of speech, of the press; in religion, *in house, papers, and effects;* from arrest

[4] See also the denunciation of the brutal misconduct of a group of Norfolk policemen by Rep. Platt of Virginia, at Globe, Appendix 184-85 (April 4, 1871). Rep. Whitthorne, of Tennessee, an opponent of the Act, assumed that it would be applicable to police officers and attempted to satirize the result. See *Globe*, 337 (March 29, 1871).

[5] Congressman Garfield was inquiring specifically about Section 2 of the pending bill. R.S. § 1979 was found at Section 1. But the phrase "rights, privileges and immunities secured by the Constitution . . . ." was identical in each section, and Maynard's answer was clearly applicable to both sections.

without warrant, from being twice put in jeopardy for the same offense; indeed, every personal right enumerated in the Constitution . . . ."

Globe, Appendix 310, col. 2 (Emphasis supplied).

Congressman John A. Bingham, famous as "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California*, 332 U.S. 46, 74 (1947), on the day following Maynard's speech, reiterated Maynard's point:

"Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, . . . are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:

". . . . [Quoting Amendments One through Three.]

"4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

". . . . [Quoting Amendments Five through Eight.]"

Globe, Appendix p. 84.

In the same vein, Rep. Dawes of Massachusetts listed the rights to be protected by the bill. However, Dawes read the actual text of *but one* of the first eight amendments. He said:

". . . and still further, sir, his house, his papers, and his effects were protected against unreasonable seizure. Let me read, Mr. Speaker, this article in full:

" 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .'

". . . .

"It is to protect and secure . . . [the citizen] in these rights, privileges and immunities this bill is before the House . . . ."

Globe, 475, 476 (April 4, 1871).

Rep. Roberts of New York agreed:

"Nothing can so weaken the life of a Government as even to seem to neglect its citizens. No higher duty can exist than to protect them. Be they white or black, they must have free speech, a free ballot, *and a safe home*."

Globe, 414, col. 1 (April 3, 1871) (Emphasis supplied).

Lest petitioners' position be misunderstood, we emphasize that *it is not here contended that every provision of the first eight amendments is made applicable to State action by the fourteenth amendment's privileges and immunities clause or its due process clause*. But the above quotations *do* negate the possibility that Congress was oblivious to the search and seizure implications of its legislation conferring a federal cause of action for damages upon persons whose "rights, privileges, or immunities secured by the Constitution" might be violated by state officers. This fact powerfully reinforces the view already expressed by a majority of this court in *Elkins* v. *United States*, 364 U.S. (Adv.) ..., 80 S. Ct. 1437 (1960) that the unreasonable searches and seizures forbidden by the fourth amendment are likewise forbidden by the fourteenth.

Certainly, there is nothing novel about a private citizen suing for damages after having been victimized by an unreasonable search of his home by policemen. This Court, in *Wolf* v. *Colorado*, 338 U.S. 25, 30-31 (1949), explicitly held that "private action" was an appropriate remedy. "Private action" for damages is peculiarly fitting, because it not only serves to deter the lawless officer and to compensate his victim, but it also avoids the dilemma

posed by the technique of suppressing evidence in criminal trials: that "the criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585 (1926), quoted by this court in *Elkins* v. *United States*, 364 U.S. (Adv.) ....., ..., 80 S. Ct. 1437, 1444 (1960).

It is noteworthy that the earliest judicial pronouncements on the legitimacy of unreasonable searches and seizures came in cases where money damages were sought. John Wilkes, in 1763, recovered £1,000 for the search of his home and the seizure of his papers by King's messengers acting under a general warrant; Lord Chief Justice Pratt commented to the jury that the power to issue general warrants was "totally subversive of the libery of the subject," and "contrary to the fundamental principles of the constitution." *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153, 1167 (C.P. 1763).

Also in 1763, one Huckle, a journeyman printer, recovered £300 in a similar action. Huckle had been seized under a general warrant, and held without charge for six hours by the King's messenger Money, who "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damage." *Huckle* v. *Money*, 2 Wils. 205 (C.P. 1763). On motion for a new trial "for the excessiveness of the damages," Lord Chief Justice Pratt upheld the verdict on the apparent ground that the award, although very large, was justified because of the grave nature of the offense:

> "[T]he jury] saw a magistrate over all the King's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them.

"* * * *

"To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the *Spanish* inquisition, a law under which no *Englishman* would wish to live an hour: it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of *Magna Charta* . . . which is pointed against arbitrary power, was violated."

2 Wils. at 207 (Emphasis in original).

Finally, two years later, Lord Mansfield and three other judges affirmed judgment on a jury verdict of £300 in favor of yet another victim of an unreasonable search and seizure. *Entick* v. *Carrington*, 19 How. St. Tr. Col. 1029 (C.P. 1765). *Entick*, "regarded as one of the permanent monuments of the British Constitution," *Boyd* v. *United States*, 116 U.S. 616, 626 (1886), resulted in a definite change in Parliament's policy and the ultimate abandonment of the general warrant. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 48-50 (1937).

Thus, petitioners' present claim reaches this court with impressive historical credentials. It comes with compelling support in the legislative history of R.S. §1979. And it is clearly confirmed by recent utterances of this court.

APPENDIX B.

MEMORANDUM ON THE LEGISLATIVE HISTORY OF § 1979, AS IT RELATES TO THE REASONS FOR FEDERAL JURISDICTION AND THE ACT'S INTENDED SCOPE.

Implicit in many of the lower court decisions construing the Civil Rights Acts seems to be a feeling that Congress was exclusively concerned with protection of Negroes in the South from discrimination. Also in some of these cases there is expressed an attitude that federal remedies are not important, because state remedies are available.

Petitioners suggest that the legislative history of R.S. § 1979 contains ample evidence that Congress intended its Act to protect individuals in every state of the Union, and that it intended that the Act should protect all races and classes of men in their constitutional rights.

Petitioners also suggest that the legislative history contains ample evidence that Congress, in conferring exclusive federal jurisdiction for actions under R.S. § 1979, acted upon the basis of articulated policy considerations which are still relevant today.

1. CONGRESS INTENDED THAT R.S. § 1979 SHOULD HAVE NATION-WIDE APPLICATION AND THAT IT SHOULD PROTECT ALL AMERICANS.

"There is something involved here transcending party issues and party schemes, and calling upon us for the calmest and coolest deliberation and the broadest and ablest statesmanship. The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property rights, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes,

will be benefitted alike, because we are simply contending for good government and righteous laws.

"• • •

"And what has [President Grant] asked at our hand? For legislation under the Constitution to enable him to make the protecting shield of American citizenship as powerful to the humblest citizen, of whatever race or color, in Texas as in New England; to secure to the weakest citizen of the Carolinas the same political and civil rights enjoyed by the most favored citizen of the Republic."

Rep. Buckley, Alabama, *Globe*, Appendix 199, 196 (April 3, 1871).

"I want the law to apply in Nevada as well as in North Carolina.

"• • • •

". . . The honorable Senator from Missouri hands up an account of an outrage in my own State. For it I blush, and I have no apology to make for it; it was a wrong, and I want the law to apply there as well as in the State (of North Carolina) . . . . I would give protection to the humblest citizen in the most distant part of Missouri . . . . I would give it to North Carolina; I would give it from the East to the West, and cover the whole area of this country . . . ."

Sen. Nye, Nevada, *Globe* 657, 659 (April 13, 1871).

"The question now, is, whether it is competent for the Congress . . . to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitution."

Rep. Bingham, Ohio, *Globe*, Appendix 81 (March 31, 1871).

"The bill before us . . . is general, applicable to every State of the Union, or all of them together . . . ."

Rep. Archer, Maryland, *Globe* 373, col. 1 (March 31, 1871) (Opposing the bill).

"This . . . is a synopsis of the evidence . . . . It is evidence wholly in reference to North Carolina . . . . But now we are called on to consider a bill, not for the suppression of disorders in North Carolina, but to reach every State in the Union . . . ."

Rep. McCormick, Missouri, *Globe*, Appendix 137, col 3 (March 31, 1871) (Opposing the bill).

"It has been asserted that protection for the colored people only has been demanded; and in this there is a certain degree of truth, because they are noted for their steadfastness to the Union and the cause of liberty . . . . But, on the other hand, this protection is equally desired for those loyal whites, some to the manner born, others who, in the exercise of their natural rights as American citizens, have seen fit to remove thither from other sections of the States, and are now undergoing persecution simply on account of their activity in carrying out Union principles and loyal sentiments in the South."

Rep. Rainey, South Carolina, *Globe*, 394, col. 3 (April 1, 1871).

"The rights, privileges, and immunities which the Constitution confers upon the citizen, or guaranties to him, no State, no community, no individual should be permitted to take way, abridge, or render insecure. The Constitution should cover the nation as a shield and encompass its citizens like a fortress. It should be supreme, omnipotent, and omnipresent in all the States and Territories of the Union, and if one individual in Ohio, in Georgia, or elsewhere on United States soil, cannot, by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, obtain the rights and privileges due an American citizen, and thereupon appeals to Congress for help, it is its duty to listen to that appeal."

Rep. Beatty, Ohio, *Globe*, 429, col. 2 (April 3, 1871).

"This law is asked for the protection of every class of citizens. We demand it not simply for the black

man, but for the Union men of the South, and even for the ex-rebels who would now yield obedience to the Government." '

Rep. Dunnell, Minnesota, *Globe*, Appendix 262, col. 5 (April 4, 1871) (This speech was not delivered on the floor of the House. It was merely inserted in the *Globe* by unanimous consent.)

"This section [now R.S. §1979] of this bill, . . . not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people . . . ."

Rep. Shellabarger, Ohio, *Globe*, Appendix 68, col. 1 (March 28, 1871). (Sponsor of the bill).

2. CONGRESS BASED ITS DECISION TO CONFER FEDERAL JURISDICTION FOR ACTIONS UNDER R.S. §1979 ON GROUNDS THAT ARE STILL RELEVANT TODAY.

Federal judges are appointed for life, on good behavior. Const. Art. III, §1. Most state judges are elected for varying terms. Many people feel that, for this reason, federal judges are more independent that state judges. Many people feel that, for this reason, the unpopular cause or litigant is likely to receive a fairer trial in federal court than in a state court. The Congress that enacted R.S. §1979 thought so.

During the course of the House debate on R.S. §1979, the following testimony given by a North Carolina judge was read into the record:

"Question: Can you suggest any remedy which, in your own belief as a judicial officer, would arrest these outrages?

"Answer. I declare I do not know what to suggest. A remedy might be enforced in the Federal courts perhaps. The judges in whose districts these outrages are alleged to be committed say they cannot do it in

the State courts, for the reason that they who vote occupy the jury-box .... Something must be done ..."

Globe, Appendix 137, col. 3 (March 31, 1871) (Speech of Rep. McCormick, Missouri).

Other congressmen echoed this sentiment, in varying terms:

"Local prejudices may become so strong and violent that they may overturn that sense of justice which we fondly hope, however, may ever dominate in the bosoms of all our rulers. We well understand the influence of popular sentiment, under elective governments, upon those who depend upon popular will for place and power. Governors, *judges*, and juries give way to a mania which sometimes seizes hold of the popular mind. Prejudices and passions, which make men forget their duties are more likely to be local than national. It is better, therefore, to have a Government less local and more general, and which is responsible to a whole nation and not alone to a small portion. Such a Government is more likely to be impartial, and to remain uninfluenced by prejudices and passions.

Rep. Sheldon, Louisiana, *Globe* 368, cols. 1-2 (March 31, 1871) (Emphasis supplied).

"The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"

Rep. Rainey, South Carolina, *Globe* 394, col. 3 (April 1, 1871).

"The reason the loyal people of Virginia are now free from Klu Klux violence, is because the judiciary, the Executive, and the Legislature are in the hands

of the Democratic party. The outrages committed upon loyal men there are under the forms of law. It can be summed up in one word: loyal men cannot obtain justice in the courts, or from the Legislature or the Executive of Virginia. And the same is true of Kentucky."

Rep. Porter, Virginia, *Globe, Appendix* 277, col. 1 (April 4, 1871).

"Some have here contended that our protection must come from the State in which we chance to reside. The old hateful doctrine of State rights is here urged, and we are told that the Federal Government has nothing to do in behalf of the citizen unless, indeed, the State authorities call for aid. These narrow views are repugnant to me. Our national life is involved in crises such as this. Shall not a power co-extensive with this life be invoked? Do we not instinctively turn to the Government for protection?

Rep. Dannell, Minnesota, *Globe, Appendix* 262, col. 2 (April 4, 1871) (This speech was not delivered on the floor of the House, but was inserted in the *Globe* by unanimous consent.)

". . . It has been a well recognized, I might say an undenied fact, that no Republican, white or black, especially if he is a citizen who has come here from another State or is at all prominent, can secure as plaintiff or defendant anything like equal justice before the courts of the State . . . ."

Rep. Platt, Virginia, *Globe Appendix* 185, col. 2 (April 4, 1871).

"To say in our Constitution . . . that State laws shall not be made or enforced to abridge these rights . . . nor the States deny protection of these rights . . . and then to say that Congress can do no such thing as . . . open the United States courts to enforce any such laws, but must leave all the protection and law-

making to the very States which are denying the protection, is plainly and grossly absurd."

Rep. Shellabarger, *Globe*, Appendix 68, col. 2 (March 28, 1871) (Sponsor of the bill).

The well known statement of Rep. Dawes of Massachusetts, in the House debate on April 4, 1871, which was quoted in part by Justice Douglas in the dissenting opinion in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 180-181 (1959), summarizes the attitude of Congress:

"The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.

"* * * *

"I conclude, then, Mr. Speaker, by saying that in my opinion Congress has power to legislate for the protection of every American citizen, in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done—

"*First.* By giving him a civil remedy in the United States courts for any damage sustained in that regard."

Rep. Dawes, Mass., *Globe* 476, 477 (April 5, 1871).

APPENDIX C.

Constitutional Provisions of 60 Nations Pertaining to Search, Seizure, and the Inviolability of the Home.

The following provisions are found in Dodd, Modern Constitutions (1908), *Vol. I*:

Constitution of Brazil (1891):

"Art. 72, Sec. 11. The house is the inviolable asylum of the person who inhabits it; without his consent no one shall enter it at night, except to aid the victims of a crime or disaster, or during the day, except in the cases and in the manner prescribed by law."

Constitution of Chile (1833):

"Art. 137. The house of every person residing in Chilean territory shall be an inviolable asylum, and may not be entered except for special cause determined by law, and by virtue of an order of the proper authority."

"Art. 138. Epistolary correspondence shall be inviolable. No papers or effects shall be opened, intercepted, or searched except in the cases provided by law."

Constitution of Denmark (1866):

"Art. 81. The domicile is inviolable. The search of a house, the seizure and examination of letters and other papers shall take place only by virtue of a legal warrant, unless a special exception be authorized by law."

The following constitutional provisions are found in Dodd, op. cit. *Vol. II*:

Constitution of Italy (1848):

"A. 27. The domicile is inviolable. No search of a house shall take place except by virtue of law and in manner prescribed by law."

Constitution of Japan (Feb. 11, 1889):

"Art. 25. Except in the cases provided for in the law, the secrecy of the letters of every Japanese subject shall remain inviolable."

Constitution of Mexico (Feb. 15, 1857):

"Art. 16. No one shall be molested in his person, family, domicile, papers or possessions, except by virtue of a written order from a competent authority, which shall establish and set forth the legal grounds for the proceeding."

Constitution of Netherlands (1887):

"Art. 158. The entrance of a dwelling against the will of the occupant shall only be allowed in the cases determined by law and by virtue of a special or general warrant from an authority designated by law."

Constitution of Portugal (April 29, 1826):

"Art. 145 (6). The house of every citizen is an inviolable refuge. At night no one shall enter it except with his consent, or in case of request from within it, or to protect it from fire or flood; during the day no house shall be entered, except in the cases and in the manner provided by law."

Fundamental Laws of the Russian Empire (May 6, 1906):

"Chap. 1. 33. The domicile of everyone is inviolable. Searches or sequestrations in a domicile without the consent of the owner shall take place only in the cases and in the manner provided by law."

Political Constitution of the Spanish Monarchy (June 30, 1876):

"Art. 6. No one shall enter the house of a Spaniard or of a foreigner resident in Spain, without his consent, except in the cases and in the manner expressly provided by law."

[This provision is no longer in force. See Charter of Spain, 1945, *infra.*]

The following provisions are found in Peaslee, Constitutions of Nations (1950), *Vol. I (page references after the constitutional provisions are to Peaslee)*:

Fundamental Principles of the Government of Afghanistan (October 31, 1931):

"16. The residence of every Afghan subject is safe from every sort of interference. No official or other person may enter a private residence without an order under Shariat law or the law of the land." (p. 26)

Constitution of Albania (March 15, 1946):

"Art. 20. A home cannot be violated.

No person can enter a house and search it against the wishes of the owner, except when he holds a court order in his hands.

No search can be made except in the presence of two witnesses. The owner of the house also has a right to be present."

"Art. 21. The secrecy of mail and other correspondence cannot be violated except in cases of criminal investigations, military mobilization, or state of war." (p. 42)

Constitution of Argentina (March 16, 1949):

"Art. 29. . . . . The domicile is inviolable, as also the epistolary correspondence and private papers; and a law is to determine in what cases and with what reasons their search and seizure shall be allowed . . ." (p. 66)

Constitution of Belgium (February 7, 1831):

"Art. 10. The private domicile is inviolable; no search of premises shall take place except in the cases provided for by law and according to the form therein prescribed." (p. 128)

Constitution of Bolivia (November 23, 1945):

"Art. 15. . . .

Private papers and correspondence are inviolable and shall not be seized except in cases determined by law and by written order of competent authority setting forth the reasons therefor. Intercepted letters and private papers seized in violation of this provision shall have no legal effect.

Art. 16. Every house is an inviolable asylum; at night it shall not be entered without the consent of the person who inhabits it, and in the daytime, entrance thereto is only allowed on written order of a lawful authority setting forth the reasons therefor, except *in flagrante delicto*." (pp. 154-155)

Constitution of Brazil (September 24, 1946):

"§ 15. The home is the inviolable refuge of the individual. No one may enter therein at night, without the consent of the dweller, except to go to the assistance of the victims of a crime or a disaster, or during the day, except in the cases and in the manner established by law." (p. 207)

Constitution of Bulgaria (December 4, 1947):

"Art. 85. Homes are inviolable. Without the consent of the householder, no one may enter his home or premises and conduct a search there unless conditions required by law are observed." (p. 243)

Constitution of Burma (September 24, 1947):

"16. No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law." (p. 251)

Constitution of Byelorussian, S.S.R. (February 19, 1937):

"Art. 102. Citizens of the B.S.S.R. are guaranteed inviolability of personal freedom. No one can be arrested without a court decree or a sanction of a public prosecutor.

Art. 103. The inviolability of citizens' homes and secrecy of correspondence are guaranteed by law." (p. 311)

Constitution of Canada (1867):

"There is no express declaration in the Constitution of Canada, as defined above, of rights of the people. As in other British Dominions, certain basic rights are recognized and enforced by the courts, which are deemed to flow from the British Bill of Rights of 1689, plus other legislative enactments, and decisions of British courts." (p. 318)

Constitution of Ceylon (May 15, 1946):

"The Constitution provides that no law enacted by Parliament shall prohibit or restrict the exercise of any religion; make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or alter the constitution of any religious body except with the consent of the governing authority of that body; and that any such laws shall be 'void.'

Apart from these provisions, other safeguards of the rights of the people are to be found in British constitutional documents, precedents and traditions." (p. 368)

Constitution of Chile (September 18, 1925):

"12. Inviolability of the home.

The house of any person living in Chilean territory can be forcibly entered only for a special purpose, determined by law, and by virtue of an order from the competent authority;

13. Inviolability of epistolary and telegraphic correspondence. Documents or public securities shall not be opened, intercepted, or examined except in the cases expressly designated by the law;" (pp. 414-415)

Constitution of Colombia (February 16, 1945):

"Art. 23. No one may be molested in his person or family, or imprisoned or arrested, or have his domicile searched, except upon a warrant issued by competent authority, with all legal formalities and for cause previously defined by law.

In no case shall there be detention, imprisonment, or arrest for debts or purely civil obligations, unless it is to secure the results of a suit.

Art. 24. He who is caught *in flagrante delicto* may be arrested and taken before the judge by any person. If the agents of the authority pursue him and he takes refuge in his own dwelling, they may enter it for the purpose of arresting him; and if he seeks asylum in the dwelling of another person, the consent of the owner or tenant thereof shall be previously obtained." (pp. 471-472)

Constitution of Costa Rica (December 7, 1871):

"Art. 30. The domiciles of the inhabitants of the Republic are inviolable, and may not be entered except in the cases and with the formalities prescribed by the law.

Art. 31. In no case can the private papers of inhabitants of the Republic be either seized or examined.

Art. 32. The secrecy of written or telegraphic correspondence is inviolable, and such as may have been seized shall not have legal weight." (p. 506)

Constitution of Cuba (July 5, 1940):

"Art. 32. Secrecy of mail and other private documents is inviolable, and neither the former nor the latter can be seized or examined except by official agents or officers, by virtue of a decree, stating its reasons, issued by a competent judge. In every case secrecy shall be maintained with respect to details alien to the matter that led to the seizure or examination. Secrecy of telegraphic, telephonic, and cablegraphic communication is declared inviolable on the same terms."

"Art. 34. Domiciles are inviolable, and consequently no one can enter at night the domicile of another without the consent of its occupant, unless it be to rescue the victims of a crime or disaster; nor by day, except in the cases and in the manner determined by law.

In case of the suspension of this guarantee, it shall be an indispensable requisite, for entering a person's domicile, that it be done by the proper competent authority, under a written order or resolution, an authentic copy of which shall be left with the occupant, his relatives, or the nearest neighbor, according to circumstances. When the authorities delegate any of their agents for the purpose, the same procedure shall be followed." (p. 532)

Constitution of Czechoslovakia (June 9, 1948):

"Section 4

The inviolability of the domicile is guaranteed. It may be restricted only on the basis of the law.

Section 5

1. The premises of no one may be searched, except in cases permitted under the law, and then only by a court or public functionary competent by law, and in the manner prescribed by law.

2. A search may be carried out, unless the law directs otherwise, only on the strength of a written circumstantiated warrant granted by a judge or competent authority. This warrant shall be served at the time of the search, or, if this is not possible, within 48 hours thereafter.

3. The functionary carrying out the search shall produce his authority, and furnish the person whose premises he has searched, at the request of that person, at the time of the search, or, if this is not possible, within 48 hours thereafter, with a written statement giving the reasons for the search, and the result thereof, and a list of all articles seized." (pp. 605-606)

Constitution of Denmark (June 15, 1915):

"79. The dwelling is inviolable. House searching, seizure and examination of letters and other documents if a special exception is not prescribed by any law, may take place only after a judicial decision has been pronounced." (p. 652)

Constitution of the Dominican Republic (January 10, 1949):

"Art. 6. There are consecrated as inherent in the human personality: . . .

8. Inviolability of correspondence and other private documents, which cannot be seized or inspected except as the result of legal proceedings in connection with matters which are then before the courts. Also inviolable is the secrecy of telegraphic, telephonic, and cablegraphic communication." (pp. 658, 659)

Constitution of Ecuador (December 31, 1946):

"Art. 187. The State guarantees the following to the inhabitants of Ecuador: . . .

(6) The inviolability of the home. No one may enter a home against the will of its proprietor unless an order signed by competent authority be presented: and without such an order, only in the cases expressly provided by the law;

(7) The inviolability of correspondence by mail or otherwise. Consequently the interception, opening, or inspection of another's correspondence is prohibited, except in the cases provided by the law;" (711, 712)

Constitution of Egypt (April 30, 1923):

"Art. 8. The home is inviolable. No search of a private house may take place except in cases stipulated for by law and carried out in conformity with its regulations."

"Art. 11. The secrecy of letters, telegrams, and telephone communications is inviolable, except in cases provided for by law." (p. 722)

Constitution of El Salvador (August 13, 1886):

"Art. 21. The searching of the person shall only be made to prevent an offense from being committed, or to investigate crimes or offenses." (p. 742)

Constitution of Ethiopia (July 16, 1931):

"Art. 25. Except in cases provided for by law, no domiciliary searches may be made."

"Art. 26. Except in cases provided by the law, no one shall have the right to violate the secrecy of the correspondence of Ethiopian subjects." (p. 769)

Form of Government of Finland (July 17, 1919):

"Art. 11. The domicile of Finnish citizens shall be inviolable.

The conditions under which domiciliary searches may be ordered and carried out shall be determined by law."

"Art. 12. The secrecy of postal, telegraphic, and telephonic communication shall be inviolable, except when otherwise provided by law." (p. 778)

The following constitutional provisions are found in Peaslee, op. cit. *Vol. II:*

Constitution of Greece (June 1 (14), 1911):

"Art. 12. The dwelling is inviolable. Domiciliary searches can only be made when and as the law directs.

Offenders against these provisions are punished for abuse of authority, and are bound fully to indemnify the injured party, and further to compensate him in a sum of money fixed at the discretion of the law court, but never less than one hundred drachmas."

"Art. 20. The secrecy of letters is absolutely inviolable." (pp. 52, 53)

Constitution of Guatemala (March 11, 1945):

"Art. 35. The correspondence of all persons and their private books and papers are inviolable. Those that are taken possession of will not have validity in litigation. They may be taken possession of or inspected only by virtue of the act of a competent judge and with the legal formalities.

Competent functionaries of the treasury may also, by written order, provide for the inspection of private papers and books that relate to the payment of the fiscal taxes. In all cases the seizure or inspection must be effected in the presence of the interested person, his representative or one of his relatives, and in their absence, before two witnesses, neighbors and of recognized integrity."

"Art. 37. The domicile is inviolable. No one may enter it without the permission of the owner, except by written order of a competent judge, and never after 6 P.M. or before 6 A.M. The law determines the formalities and the exceptions where breaking into a house may be proceeded with. The examination of documents and effects must always take place in the presence of the interested person, of his representative or of a member of his family, and for lack of them, before two witnesses, neighbors and of recognized integrity." (pp. 76-77)

Constitution of Haiti (November 22, 1946):

"Art. 14. No domiciliary visit or seizure of papers may take place except by virtue of law and in the legally prescribed forms."

"Art. 28. The secrecy of letters is inviolable. The law determines what agents are responsible for the violation of letters entrusted to the mail." (pp. 114, 115)

Constitution of Honduras (March 28, 1936):

"Art. 48. The habitation of every individual is a sacred asylum which may not be entered except by the authorities in the following cases:

(1) In order to take an offender discovered *in flagrante;*

(2) On account of the commission of an offense inside the habitation, on account of scandalous disorder requiring prompt remedy, or because of outcries from within;

(3) In cases of fire, earthquake, flood, epidemic, or other like cause; and to make any visit or inspection of a purely sanitary character;

(4) In order to set free a person unlawfully detained;

(5) To recover property in pursuance of a writ, acting on probable proof, at the least, of the presence of this property; and to execute a judicial sentence legally decreed;

(6) To apprehend a criminal against whom has been entered a sentence of imprisonment or of detention, acting, at the least, upon probable proof that he is hidden in the house to be entered.

In the last two cases entry shall not be made except under written order of competent authority.

Art. 49. Whenever the domicile to be entered is not that of the criminal sought, the authority, or its agents, shall first solicit permission of the tenant.

Art. 50. Entry of the domicile shall not be made from seven at night until six in the morning without permission of the head of the house.

Art. 51. Correspondence by letter and telegraph and private papers are inviolable without prejudice to that provided in the law of the state of siege.

Neither the executive power nor its agents may withdraw, open, or detain the said correspondence. Correspondence taken from the post office or any other place shall not be competent evidence in court.

Art. 52. Individual correspondence, private papers, and books shall not be seized except by virtue of a writ from a competent judge in criminal and civil cases as determined by law, and must be examined in the presence of the owner or, in his absence, of two witnesses, and that must be returned which has no relation to the matter under investigation." (pp. 139-140)

Constitution of Iceland (June 17, 1944):

"Art. 66. The home shall be inviolate. Houses may not be searched, nor any letters or other documents be detained and examined, except by judicial warrant or a special provision of law." (p. 177)

Constitution of Iran (December 30, 1906):

"Art. 9. The life, property, domicile, and honor of every individual is secured and guaranteed from every kind of injury. No one can be disturbed except by order of and in the manner defined by, the laws of the land."

"Art. 13. The dwelling-place and house of every individual is inviolable. In no dwelling-place can forcible entry be made, except by order of, and in the manner defined by, law."

"Art. 22. Postal communications are inviolable, and secured against seizure or opening, except in cases in which the law makes exception.

"Art. 23. The publication or seizure of telegraphic communications without the permission of the author of the telegram is forbidden except in cases in which the law makes exception." (p. 207)

Constitution of Iraq (March 21, 1925):

"Art. 8. The inviolability of all places of residence is guaranteed. They may not be entered or searched except in such circumstances and in such manner as may be prescribed by law."

"Art. 15. All postal and telegraphic correspondence and all telephonic communications shall be secret and free from censorship or detention, except in such circumstances and in such manner as may be prescribed by law." (p. 219)

Constitution of Ireland (December 29, 1937):

"Art. 40, 5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." (p. 259)

Constitution of Italy (January 1, 1948):

"Art. 13. Personal liberty is inviolable.

No form of detention, inspection, or personal search or any other restriction of personal liberty is permitted except by a duly authorized act of the judicial authorities and then only in cases and under the procedure prescribed by law.

In exceptional cases of necessity and urgency, explicitly provided by law, the public security authorities may take provisional measures which shall be communicated within forty-eight hours to the judicial authorities; and, should the latter not confirm their validity within the next forty-eight hours, such measures are considered revoked and lose all effect.

Physical and psychological violence against persons placed under some form of restriction of personal freedom is punished.

The maximum duration of preventive detention is specified by law.

Art. 14. Personal domicile is inviolable.

No inspection, search, or sequestration may be carried out, except in cases and under procedures prescribed by law and in accordance with the guarantees prescribed for the protection of personal liberty.

Investigations and inspections for reasons of public health or safety or for fiscal or economic reasons are regulated by special legislation.

Art. 15. Freedom and secrecy of correspondence and of every other form of communication are inviolable.

Limitations thereon may be effected only by a duly authorized act of the judicial authorities in accordance with the guarantees prescribed by law." (pp. 280-281)

Constitution of Japan (November 3, 1946):

"Art. 17. Every person may sue for redress, as provided by law, from the State or a public entity, in case he has suffered damage through illegal act of any public official."

Art. 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended while committing the offense."

"Art. 35. The right of all persons to be secure in their homes, papers, and effects against entries, searches, and seizures shall not be impaired except upon warrant issued for adequate cause, and particu-

larly describing the place to be searched and things to be seized, or except as provided by Article 33." (pp. 309, 310)

Constitution of Jordan (December 7, 1946):

"Art. 10. All dwelling houses shall be immune and no entry therein shall be permitted except in the circumstances and in the manner prescribed by the law."

"Art. 20. All postal, telegraphic and telephonic communications shall be treated as secret, and shall not be subject to censorship or to detention except in the circumstances prescribed by the law." (p. 323)

Constitution of Lebanon (May 23, 1926):

"Art. 14. The domicile is inviolable. No one may enter it except in the cases and in the manner prescribed by the law." (p. 353)

Constitution of Liberia (July 26, 1847):

"Sec. 9. No place shall be searched, nor person seized on a criminal charge, or suspicion, unless upon warrant lawfully issued, upon probable cause supported by oath, or solemn affirmation, specially designating the place or person, and the object of the search." (p. 365)

Constitution of Liechtenstein (October 5, 1921):

"Art. 32. The liberty of the person, the immunity of the home and the inviolability of letters and writings are guaranteed.

Except in the cases and in the manner determined by law, nobody may be arrested or kept in custody, nor may any search of homes or persons, letters or writings, or a seizure of letters or writings, be made.

There shall be a claim for full compensation, to be paid by the State and to be determined by the courts, on behalf of anybody who has been arrested illegally, or innocently, as proved by evidence, and on behalf of anybody who is convicted when innocent. The laws shall determine whether, and to what extent, the State shall have a claim for reimbursement against third parties." (pp. 379-380)

Constitution of Luxembourg (October 17, 1868):

"Art. 15. The domicile is inviolable. No domiciliary visit may take place except in the cases provided for by law and in the form which it prescribes." (p. 399)

Constitution of Mexico (January 31, 1917):

"Art. 16. No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, and unless same is preceded by a charge, accusation, or complaint for a specific offense punishable by imprisonment, supported by an affidavit of a credible party or by such other evidence as would point to the probable guilt of the accused; in cases of *in flagrante delicto*, any person may arrest the offender and his accomplices, turning them over without delay to the nearest authorities. Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available may the administrative authorities, on their strictest accountability, order the detention of the accused, turning him over immediately to the judicial authorities. Every search warrant, which can only be issued by the judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the objects sought, the proceedings to be limited thereto; at the conclusion of which a detailed statement shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or by the official making the search in his absence or should he refuse to do so.

Administrative officials may enter private houses for the sole purpose of determining if the sanitary and police regulations have been complied with; and demand to be shown the books and documents required

to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search." (pp. 418-419)

Constitution of Monaco (January 5, 1911):

"Art. 8. The domicile is inviolable; no domiciliary visit may take place except in cases provided by law and in the manner which it prescribes." (p. 465)

Constitution of Mongol People's Republic (June 30, 1940):

"Art. 86. Citizens of the Mongol People's Republic are guaranteed inviolability of the person. No person may be placed under arrest, except by decision of a court or with the sanction of a procurator.

Art. 87. The inviolability of the homes of citizens and privacy of correspondence are protected by law." (p. 485)

New Zealand:

"There is no statement of rights of the people, but British laws and customs prevail." (p. 546)

Constitution of Netherlands (August 24, 1915):

"165. To enter a dwelling against the occupant's will shall only be permitted in the cases determined by law, by virtue of a special or general order given by an authority designated by law.

The forms to which the exercise of this power shall be bound shall be regulated by law.

166. The secrecy of letters entrusted to the postal service or to other public institutions of conveyance shall be inviolable, except by order of a judge in the cases described by law." (p. 533)

Constitution of Nicaragua (January 21, 1948):

"Art. 54. The State guarantees the inviolability of the home. The dwelling of any person in Nicaraguan territory may be forcibly entered only by the authorities in the following cases:

(1) In the actual pursuit of a delinquent;

(2) To remove a criminal surprised *in flagrante;*

(3) For complaints from the interior of the habitation; for the commission in it of a crime or for scandalous disorder that requires prompt remedy;

(4) In the case of fire, earthquake, flood, epidemic, or anything similar;

(5) For any visit or inspection for statistical, sanitary, or hygienic reasons;

(6) To liberate a person illegally held;

(7) To remove objects required by virtue of a trial, when there is at least some proof of the presence of the said objects;

(8) To execute a resolution, mandate, or judicial order legally decreed;

(9) To apprehend a culprit against whom has been issued an act of detention or imprisonment, when there is at least some proof that he is hiding in the house to be entered.

In the last four cases the house may not be broken into except by virtue of a written order and under direction of a competent authority.

When the domicile to be entered is not that of the prisoner who is being pursued, the authority or its agents shall first solicit the permission of the occupant.

Breaking into houses in the cases requiring written permission of a competent authority may not occur from seven at night until six in the morning without the consent of the head of the house." (pp. 640-641)

Constitution of Norway (May 17, 1814):

"99. No one may be arrested and committed to prison except in the cases determined by law and in the manner prescribed by the laws. For unjustifiable arrest and illegal detention the officer concerned shall be responsible to the person imprisoned."

"102. Domiciliary visits shall not be made except in criminal cases." (pp. 686, 687)

Constitution of Panama (March 1, 1946):

"Art. 26. The home is inviolable. No one may enter another's home without the consent of its owner, except by written order of competent authority or to help victims of crimes or disasters." (p. 705)

Constitution of Paraguay (July 10, 1940):

"Art. 27. Defense in the judgment of a person or rights is inviolable. Also inviolable are the domicile, epistolary correspondence, and private papers. The law will determine in what cases the inviolability of the domicile and correspondence may be suspended." (p. 747)

Constitution of Peru (April 9, 1933):

"Art. 61. The abode is inviolable. It may not be entered without the prior production of a written warrant, with a reason assigned, from the judge or the competent authorities." (p. 769)

Constitution of the Philippines (February 8, 1935):

"Sec. 1. (1) No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

"(3) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

"(5) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise." (p. 794)

The following constitutional provisions are found in Peaslee, op. cit. *Vol. III*:

Political Constitution of the Portuguese Republic (August 1, 1935):

"8. The following constitute the rights and individual guarantees of Portuguese citizens: . . .

(6) Inviolability of domicile and secrecy of correspondence on conditions determined by law." (pp. 5, 6).

Constitution of Rumania (April 13, 1948):

"Art. 29. The domicile is inviolable. No person may enter the home or residence of a citizen without his consent, except in his presence and on the basis of a written warrant from the appropriate authority, or in case of *flagrante delicto*." (p. 40)

Saudi Arabia:

"The constitutional documents contain no specific guarantees of individual rights." (p. 60)

Charter of Spain (July 16, 1945):

"Art. 13. Inside national territory, the State guarantees the liberty and inviolability of correspondence." (p. 78)

Constitution of Sweden (June 6, 1809):

"Art. 16. The King shall maintain and further justice and truth, prevent and forbid iniquity and injustice; he shall not deprive anyone or allow anyone to be deprived of life, honor, personal liberty or well-being, without legal trial and sentence; he shall not deprive anyone or permit anyone to be deprived of any real or personal property without due trial and judgment in accordance with the provisions of the Swedish law and statutes; he shall not disturb or allow to be disturbed the peace of any person in his home; . . ." (p. 99)

Constitution of Thailand (March 23, 1949):

"Sec. 33. The dwelling of a person in inviolable. The right belonging to a person to enjoy peaceful habitation in and peaceful possession of his dwelling is guaranteed. An entry into such a dwelling without his permission or a search thereof may be made only by virtue of the power determined by law." (p. 168)

Constitution of Turkey (January 10, 1945):

"Art. 70. Personal immunity, freedom of conscience, of thought, of speech and press, the right to travel, to make contracts, to work, to own and dispose of property, to meet and associate, and to incorporate form part of the rights and liberties of Turkish citizens.

Art. 71. The life, property, honor, and residence of each individual are inviolable." (p. 197)

Constitution of Ukrainian SSR (January 30, 1937):

"Art. 107. Citizens of the USSR are guaranteed the inviolability of the person. No one may be arrested without a court decree or a sanction of a public prosecutor.

Art. 108. The inviolability of citizens' homes and secrecy of correspondence are protected by law." (p. 218)

Union of South Africa:

"No rights of the people are expressly stated but many practices of British Courts are observed." (p. 223)

Constitution of the Union of Soviet Socialistic Republics (December 5, 1936):

"Art. 127. Citizens of the USSR are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator.

Art. 128. The inviolability of the homes of citizens and privacy of correspondence are protected by law." (p. 281)

Constitution of Uruguay (March 24, 1934):

"Art. 11. The sanctity of the home is inviolable. No one may enter it by night without the consent of its master and by day only at the express order of the competent judge in writing and in cases determined by law." (p. 392)

Constitution of Venezuela (July 5, 1947):

"Art. 35. The Nation guarantees the inviolability of the home, which cannot be entered by force except in order to prevent the commission of a crime or in order to execute the decisions which the tribunals of justice may dictate pursuant to law. The home shall be subject, in accordance with the law, to the visits of health and fiscal authorities, due notice having first been given by the authorities or functionaries which order or make the inspection.

Art. 36. Oral, written, or any other form of correspondence shall be inviolable. No letters, telegrams, private papers, or any other means of correspondence shall be seized except upon fulfillment of the legal formalities by the judicial authority and preserving always all secrets relative to domestic and private life which have no bearing on the proceedings at issue. All books, vouchers, and accounting documents shall be subject to inspection or check by the competent authorities, in conformity with the laws." (pp. 474-475)

Constitution of Yugoslavia (January 30, 1946):

"Art. 29. The dwelling is inviolable.

Nobody may enter another person's dwelling or premises, or search them against the occupant's will, without a legal search-warrant.

A search may only be made in the presence of two witnesses. The occupant of the premises has the right to be present during the search of his dwelling or premises.

Art. 30. The privacy of letters and other means of communication is inviolable except in cases of criminal enquiry, mobilization, or war." (p. 526)

Draft National Constitutions Not Completely in Force in 1950:

Basic Law for the Federal Republic of Germany:

"Art. 13. (1) The dwelling shall be inviolable.

(2) Searches may be ordered only by a judge or in the event of imminent danger by other authorities provided by law and may be carried out only in the form prescribed therein.

(3) Interventions and restrictions may otherwise be undertaken only to avert a common danger or mortal danger to individuals and, on the basis of a law, also to prevent imminent danger to public safety and order, especially for the relief of the housing shortage, combatting the danger of epidemics or protecting juveniles exposed to dangers." (p. 602)

Draft Constitution of India (February 21, 1948):

"15. No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India." (p. 653)

Draft Constitution of Israel (December 10, 1948):

"Art. 13. (f) The liberty of the person is inviolable. No one shall be detained except pursuant to an order or judgment of a Court of Law, or when apprehended in flagrante delicto, or for the purpose of bringing him before a court on a charge of having committed a crime."

"Art. 14. The dwelling of every person is inviolable and shall not be entered or searched except in accordance with the law and in the manner therein prescribed. Private correspondence as well as telegraphic and telephonic communications shall not be intercepted. Any temporary suspension of these guarantees in time of war or national emergency shall require specific legislative authorization and shall be subject to parliamentary control." (p. 745)

The Universal Declaration of Human Rights, as approved on December 10, 1948 by the General Assembly of the United Nations, contains the following provisions:

"Art. 3. Everyone has the right to life, liberty, and security of the person."

"Art. 12. No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Yearbook of Human Rights for 1948 (United Nations), at pp. 466-467.

Additional constitutional provisions since 1950, statutes, and cases from various nations of the world, all pertaining to search, seizure, and the inviolability of the home, are collected in the annual Yearbooks of Human Rights, published by the United Nations. See Index therein, under *Home, inviolability of the.*

For a comprehensive collection of constitutional provisions, statutes, cases, and comments from the nations of the world on arbitrary arrest, detention, and exile, see *Freedom from Arbitrary Arrest, Detention and Exile—Yearbook on Human Rights, First Supplementary Volume,* (United Nations, New York, 1959).

APPENDIX D

58 PRE-1871 STATUTES IN 25 STATES INCORPORATING CITIES AND TOWNS AS "BODIES POLITIC AND CORPORATE."

Prior to 1871, at least 24 states had statutes incorporating towns and cities as "bodies politic and corporate" with capacity to sue and be sued. We quote a typical statute, and cite others. This list is illustrative only. A detailed search was made of the Alabama statutes. But in each of the other states only a few statutes were selected to serve as examples. Actually, many hundreds of such statutes had been enacted all over the nation prior to 1871.

ALABAMA

Acts of Ala., 1868, No. 132, pp. 474-76:

"An Act to incorporate the town of Scottsboro, county of Jackson.

"• • •

"Section 3. . . . [a]nd the said mayor and councilmen are hereby declared and constituted a body politic and corporate by the name and style of the 'mayor and councilmen of the town of Scottsboro,' by which name they . . . shall be capable of suing and being sued . . ."

Acts of Ala., 1857-58, No. 171, § 1, p. 194
No. 172, § 3, p. 204
No. 173, p. 206-07
Acts of Ala., 1859-60, No. 267, pp. 378-79
No. 268, pp. 381-82
No. 269, pp. 383-84
No. 270, p. 385
No. 273, p. 394
No. 278, p. 403-04
No. 280, p. 407

Acts of Ala., 1868, No. 22, § 1, p. 227
No. 40, § 2, pp. 257-258
No. 60, § 4, p. 55
No. 85, § 2, p. 73
No. 195, § 2, p. 212

CONNECTICUT

Conn. Private Laws, Vols. I & II (1789-1836), Title XI; pp. 368, 394, 406, 426, 441.

GEORGIA

Acts of Ga. (1861), No. 91, § 39.1, p. 95
Ga. Laws (1866), No. 251, §§ 1, 3, pp. 180-81
No. 268, §§ 1, 2, p. 196
Ga. Laws (1870), No. 113, § 1, p. 169
No. 121, § 1, p. 121

ILLINOIS

Ill. Laws (1835), p. 204: (Chicago)
Ill. Rev. Stat. (1845), Chap. XXV, Div. 1, § 4: (Chicago)

INDIANA

Rev. Stat. (1843) Chap. 25, § 8, p. 387: (general incorporation statute for towns)

IOWA

Iowa Rev. Laws (1860), Chap. 51, Art. 1, Sec. 1047 (18): (general incorporation law of Villages and Towns).

KANSAS

Kan. Laws (1862), Chap. XLVII, p. 398: (general incorporation law of villages and towns).

KENTUCKY

Ky. Acts (1839-40), Chap. 60, § 1, p. 36.
Ky. Acts (1853-54), Vol. 1, Chap. 202, § 1, p. 372

LOUISIANA

La. Acts (1855), No. 179, § 1, p. 232
La. Acts (1867), No. 41, § 1, p. 71

MICHIGAN

Mich. Laws (1857), No. 168, Sec. 22, p. 420-24: (general statute for incorporating villages)

MINNESOTA

Minn. Laws (1856), Chap. CXXVI, § 5, p. 134

MISSISSIPPI

Miss. Laws (1870), Chap. CXVI, § 1, p. 332
Chap. CLXXIII, § 2, p. 482

MISSOURI

Mo. Rev. Stat. (1845), Chap. 175, § 1, p. 1048: (general incorporation act for towns)

NEBRASKA

Neb. Rev. Stat. (1866), Chap. LIII, § 1, p. 379: (general incorporation act for towns); see also, p. 696

NEVADA

Nev. Laws (1869), Chap. XXXVIII, § 1, p. 78
Chap. XCIX, p. 162
Chap. CII, p. 175

NEW HAMPSHIRE

N. H. Rev. Stat. (1842), Chap. 31, § 1, p. 93

NEW YORK

N. Y. Colonial Laws 1664-1719 (Lyon 1894), p. 224
N. Y. Stat. (Blatchford, 1852), § 17, pp. 1043, 1046

NORTH CAROLINA

N. C. Private Laws (1866), Chap. 1, p. 2

OHIO

Ohio Rev. Stat. (Swan 1860), Vol. 2, Chap. 117, Sec. XVIII, p. 1498

PENNSYLVANIA

Pa. Laws (1954), No. 715, p. 790
Pa. Laws (1867), No. 668, p. 696

SOUTH CAROLINA

S. C. Stat. (Johnston 1840) Vol. 8, No. 2155, p. 290

VERMONT

Vt. Gen. Stat. (1863), Chap. 16, §§ 1, 4, p. 118: (general incorporation statute)

VIRGINIA
Va. Acts (1848-1849), Chap. 285, § 1, p. 209

WEST VIRGINIA
W. Va. Laws (1866), Chap. 59, § 3, p. 40

WISCONSIN
Wis. Rev. Stat. (1858), Title IV, Chap. XV, § 1, p. 175

The phrase "bodies politic and corporate" with power to "sue and be sued" was used as well in statutes chartering corporations other than cities and towns prior to 1871. See, for example:

Acts of Ala., 1855, No. 265, Sec. 1, p. 207: Florence Wesleyan University
Acts of Ala., 1855, No. 274, p. 219: Southern University
Acts of Ala., 1855, No. 278, Sec. 7, pp. 227-228: Commercial Bank
Acts of Ala., 1855, No. 333, Sec. 1, p. 347: Jackson Guards
Acts of Ala., 1855, No. 319, Sec. 3, pp. 325-26: Commerce Street Hotel
Acts of Ala., 1855, No. 288, Sec. 1, p. 257: Tuskegee Insurance Company.
Acts of Ala., 1855, No. 289, p. 261: Insurance Company
Acts of Ala., 1855, No. 290, p. 261: Insurance Company
Acts of Ala., 1855, No. 323, p. 333: mining and manufacturing company
Acts of Ala., 1859, No. 223, Sec. 1, p. 315
Conn. Private Laws, Vols. I & II (1789-1836), p. 475: Yale College (1745)
Ky. Acts (1839-40), Chap. 28, § 2, p. 19: literary institution
Ky. Acts (1830-40), Chap. 84, § 1, p. 45: church
Md. Laws (1860), Chap. 31, § 3: board of commissioners of public schools

APPENDIX E

SEVEN PRE-1871 STATE STATUTES DEFINING "PERSONS" AS BODIES POLITIC AND CORPORATE.

Prior to 1871 at least seven states had codified the common law construction of the word "person" in their statutes. The Illinois statute quoted below is typical.

Ill. Rev. Stat. (1845) p. 472, §29:

> "The word 'person' . . . shall be deemed to extend to and include bodies politic and corporate, as well as individuals."

The following statutes are similar:

Iowa Rev. Stat., (1860) Ch. 3, §29 (26), No. 13, p. 6.

Miss. Rev. Stat. (Hutchinson's Miss. Code, 1848) Ch. 64, Art. 12, Tit. 8 (29).

N.H. Rev. Stat. (1842) Ch. 1, §8.

Code of Va. (1849) Tit. 9, §17.

Vt. Rev. Stat. (1839) Ch. 4, §11.

Wis. Rev. Stat. (1858) Ch. 5, §1, p. 82.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 39

JAMES MONROE et al.,

Petitioners,

vs.

FRANK PAPE et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

Respondents' Brief.

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Summary of Argument.

Petitioners' complaint fails to state a Civil Rights Act cause of action because the acts complained of were not committed under color of law, custom or usage.

The Fourteenth Amendment and the Civil Rights Act are directed against state action aimed at depriving persons of their civil rights. Action of police officers that violates the Constitution and laws of Illinois and the ordinances of the City of Chicago is not state action that deprives anyone of his civil rights.

The wrongful conduct complained of in the case at bar, starting with the alleged breaking into of petitioners'

home without a warrant and the subsequent alleged misconduct, constituted a series of private torts redressable under state law but not under the Civil Rights Act.

Although the complaint alleges that the acts complained of were under color of law, the specific acts averred contradict this general allegation and show that such acts were committed contrary to all state laws and city ordinances.

Petitioners' rights may have been "invaded", "violated", or "disregarded", but petitioners have not been "deprived" of them, because the wrongs alleged were committed against petitioners without state or city authority and in direct contravention of all state laws and city ordinances.

The rule of law laid down by this court in *Screws* v. *United States*, 325 U. S. 91, and *Williams* v. *United States*, 341 U. S. 97, holding that actions by police officers, even though in contravention of state law, is under color of law or pretense of law should be held inapplicable or should be overruled because such holding is not in conformity with the object of the Fourteenth Amendment and the Civil Rights Act based upon such amendment.

The allegations in the complaint as to custom and usage are insufficient to support a Civil Rights Act cause of action because they do not show that any of the alleged customs and usages were either promulgated, sanctioned, encouraged, or even tolerated by anyone in official authority, or that police officers of Chicago could violate the constitutional or legal rights of persons without being subjected to adequate punishment under local law.

The allegations in the complaint, as to custom and usage, are contrary to the laws of Illinois and the ordinances of Chicago and, therefore, void. No Civil Rights Act cause of action can be based on such alleged void custom and usage.

The failure to include "willfulness" as an ingredient of liability in R. S. sec. 1979 (42 U. S. C. A. sec. 1983), upon which petitioners rely for their civil rights cause of action, renders such action void for indefiniteness (*Screws* v. *U. S.*, 325 U. S. 91, 97-98).

The respondent City of Chicago is not responsible for acts of its police which are in contravention of the constitution and laws of Illinois and the ordinances of Chicago because such acts are ultra vires and beyond the scope of police employment.

Section 1-15 of the Illinois Revised Cities and Villages Act which removes governmental function immunity from the City of Chicago for the acts of its police in performance of their police duties, except for acts of "wilful misconduct", confirms the defense of ultra vires and beyond scope of police employment rule of law.

Argument.

I.

Petitioners' complaint fails to show that respondent Frank Pape was acting under color of law, or pursuant to any custom or usage having the force of law; therefore, it does not state a cause of action under the Civil Rights Act against said respondent.

A.

Petitioners' complaint fails to show that respondent Frank Pape was acting under color of law.

Petitioners' argument is based on the erroneous premise that a "violation" of rights guaranteed by the Fourteenth Amendment gives rise to a Civil Rights Act cause of action (Petitioners' Brief, p. 10).

Section 1983 of the Civil Rights Act protects against state action resulting in "deprivation" of due process rights guaranteed by the Fourteenth Amendment and not against "violation" of such rights by individual action.

In the case at bar, the most that the complaint alleges is false arrest, assault, unreasonable search, and false imprisonment.

Every one of the alleged acts charged against respondent Pape is in violation of the Constitution and laws of the State of Illinois and the ordinances of the City of Chicago.

There is nothing in petitioners' complaint showing that Pape's alleged actions were pursuant to any State or City law. The mere allegation in the complaint that Pape's actions were under color of law is not sufficient to support a Civil Rights Act cause of action (*Yglesias* v. *Gulfstream Park Racing Assn.*, 5 Cir., 201 F. 2d 817, 818, citing *Bell* v. *Hood*, 327 U. S. 678, certiorari denied 345 U. S. 993).

The Constitution of Illinois, art. II, sec. 2, provides:

> "No person shall be deprived of life, liberty or property, without due process of law." (Ill. Rev. Stat. 1959, v. 1, p. 9.)

The Constitution of Illinois, art. II, sec. 6, provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." (Ill. Rev. Stat. 1959, v. 1, p. 9.)

Illinois has a false imprisonment statute which provides:

> "False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall be fined in any sum not exceeding $500, or imprisonment not exceeding one year in the county jail" (Ill. Rev. Stat. 1959, chap. 38, par. 252).

Illinois has a statute entitled "An Act in relation to the holding of persons in custody without their being able to notify their families or to have legal assistance" which provides:

> "Whoever shall, while holding another person in custody, deny that other person his right to consult and be advised by an attorney at law, whether or not such person is charged with a crime; and whoever shall prevent another person held in custody from notifying his family within 24 hours of the fact that he is being so held, shall be fined not less than $100 nor more than $1000 or shall be imprisoned for not less than ten days nor more than six months, or both" (Ill. Rev. Stat. 1959, chap. 38, par. 449.1).

Section 11-24 of the Municipal Code of Chicago at the time in question provided:

> "The members of the police force of the city, when on

duty, shall devote their time and attention to the discharge of the duties of their stations, according to the laws of the state and ordinances of the city and the rules and regulations of the department, to preserve order, peace, and quiet and enforce the laws and ordinances throughout the city."

Section 11-25 of the Municipal Code of Chicago at the time in question provided:

"The members of the police force shall have power to arrest all persons in the city found in the act of violating any law or provision of this code or aiding and abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

Section 11-40 of the Municipal Code of Chicago at the time in question provided:

"All complaints of citizens regarding officers and members of the department of police shall be investigated promptly and thoroughly. The substance of all oral complaints and copies of written complaints received at the police stations, and by the various bureaus, divisions, and sections of the service, shall be forwarded promptly to the commissioner of police."

In addition to the foregoing safeguards against the violation of civil rights Illinois has a Post-Conviction Hearing Act entitled "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted" (Ill. Rev. Stat. 1959, chap. 38, pars. 826-832) and provides (Ill. Rev. Stat. 1959, chap. 38, par. 832):

"Any final judgment entered upon such a petition [post-trial petition to review conviction] may be reviewed by the Supreme Court on writ of error brought within six months from the entry of the judgment."

Besides, evidence illegally seized by state officers is not admissible in Illinois (*Elkins* v. *United States*, 364 U. S. 206, 227).

The foregoing constitutional provisions, statutes, laws, and ordinances establish the total absence of any sanction by the State of Illinois or the City of Chicago of Pape's alleged misconduct. Pape, although a police officer, neither acted nor purported to act under color of any law, but occupied the status of a private tortfeasor. We shall deal later with the allegations of the complaint that Pape committed the wrongs complained of while acting under color of the customs and usages of the State of Illinois, County of Cook, and City of Chicago (R. 2).

It is well settled that to bring the alleged wrongs of Pape within the purview of the Civil Rights Act they must have been committed under color of law or pursuant to regulation, custom or usage having the force of law. In other words, there must either be a law of the state or city authorizing such misconduct, or a regulation, custom or usage, sanctioned by the state or city, pursuant to which the wrongs are perpetrated. Otherwise, the misconduct cannot properly be attributed to the state or its municipal subdivisions. No rule of law is better established than that the Civil Rights Act does not protect against the commission of wrongs by private action.

In *United States* v. *Cruikshank*, 92 U. S. 542, this court enunciated the doctrine that the Fourteenth Amendment does not protect persons from wrongs committed against them by private action but only against abridgment of their constitutional rights by the states. This court pointed out that this limitation applies both to the due process clause and the equal protection clause of the Fourteenth Amendment. With respect to the due process clause, this court said (pp. 553-554):

"The third and eleventh counts are even more ob-

jectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator'. Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

With respect to the equal protection clause, this court said (pp. 554-555):

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, anymore than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the en-

joyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. *The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.*" (Emphasis added).

Civil Rights Cases, 109 U. S. 3, involved the first and second sections of the Civil Rights Act passed March 1, 1875. Section one provided, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations * * * of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section two provided civil and criminal penalties. It was held said sections were beyond the power of congress to enact under the Fourteenth Amendment. This court held that said enactments must find their authority in the first section of the Fourteenth Amendment, saying (p. 11):

> "*It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope.* It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and

State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. * * * Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339" (Emphasis added).

This court further said (p. 17):

"*In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.* An individual * * * may commit an assault against the person, or commit murder, or use ruffian violence at the polls * * *; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. *Hence, in all those cases where the Constitution seeks to pro-*

tect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration" (Emphasis added).

This court further said (p. 23):

"We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property, without due process of law, and from denying to any the equal protection of the laws. * * * Under the Fourteenth amendment, it [Congress] has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating on the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

In *Douglas* v. *City of Jeannette*, 319 U. S. 157, in interpreting the Fourteenth amendment, this court said (p. 162):

"* * * Allegations of fact sufficient to show depriva-

tion of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, *whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance*" (Emphasis added).

In *Snowden* v. *Hughes*, 321 U. S. 1, this court interpreted 8 U. S. C. A. section 43, presently 42 U. S. C. A. section 1983, the statute involved herein. Petitioner there claimed that the respondents, the Illinois State Primary Canvassing Board, illegally refused to certify him as a candidate for state representative. Petitioner claimed damages for a violation of his civil rights. In affirming the United States Court of Appeals for the Seventh Circuit which had affirmed the District Court's dismissal of petitioner's suit, this court said (p. 7):

"• • • The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely *from the Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guaranties of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes.*" (Emphasis added.)

In *Collins* v. *Hardyman*, 341 U. S. 651, this court, quoting from *Shelley* v. *Kramer*, 334 U. S. 1, 13, said (p. 658):

"'Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said

to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful.'

"And Mr. Justice Douglas, dissenting, has quoted with approval from the *Cruikshank* case, 'The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it * * * add anything to the rights which one citizen has under the Constitution against another.' 92 U. S. at pp. 554-555 and 'The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.' He summed up: 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals* * * *.'"

It is clear from the foregoing cases, that the Civil Rights Act enacted pursuant to the Fourteenth Amendment can only reach state action, and that misconduct by public officials not sanctioned by the State, and indeed contrary to its laws, is not State action within the Fourteenth Amendment. If such misconduct is not State action within the Fourteenth Amendment, it cannot be within the purview of the Civil Rights Act.

The mere fact that respondent Pape was a police officer does not establish he acted under state or city sanction. For Pape's conduct to come within the protection of the Fourteenth Amendment, it must be shown to have rested "upon some State Law or State authority for its excuse and perpetration." (*Civil Rights Cases*, 109 U. S. 3, 18.)

That Pape's conduct did not rest upon state or city authority or sanction is further established by the express disclaimer of city responsibility for the wilful misconduct of police officers found in section 1-15 of the Re-

vised Cities and Villages Act of Illinois (Ill. Rev. Stat. 1959, chap. 24, par. 1-15). That statute imposes upon the City of Chicago the obligation to indemnify its police officers for judgments recovered against them arising out of injuries resulting from the performance of their police duties, but it expressly excepts cases involving "wilful misconduct" by such police officers. The complaint herein alleges a clear case of "wilful misconduct" by Pape with respect to all of the alleged wrongs perpetrated by him against petitioners.

Under the allegations of the complaint, Pape stands as a private individual who has committed wilful and intentional wrongs unsanctioned and unexcused by any state or city law. From this it follows that petitioners have not stated a case within the Fourteenth Amendment or section 1983 of the Civil Rights Act under color of law.

Petitioners' brief rests on the erroneous assumption that every act of a police officer that violates the rights guaranteed by the Fourteenth Amendment gives rise to a Civil Rights Act cause of action because every police officer acts under color of law. We have demonstrated that this court has uniformly held that such is not the law and that the United States Courts of Appeals, with few exceptions have held the same way (Appendix G, Petition for Writ of Certiorari; Brief for Respondent in Opposition, pp. 5-8).

The two cases that petitioners rely upon for their theory that every act of a police officer that violates rights guaranteed by the Fourteenth Amendment is under color of law and, therefore, constitutes state action are *Williams* v. *United States*, 341 U. S. 97, and *Screws* v. *United States*, 325 U. S. 91 (Petitioners' Brief, p. 10).

Respondents submit first that the facts in those cases are different from the facts in the case at bar so that

the holdings in those cases would not apply in the case at bar; and, second, that what this court held in those cases as to the acts of the police being under color of law, should be overruled.

As to the facts in the case at bar, the search of petitioners' home, petitioner James Monroe's arrest and the alleged assaults on petitioners are not shown by the complaint to be based on any legal warrant or process. In fact, the complaint only states that after James Monroe was arrested, he was held ten hours, during which time he was placed in "show-ups" and questioned about a murder (R. 6). He later was released without a charge being placed against him (R. 7). There is in the complaint a total lack of showing of any legal justification for the acts of respondent Pape or that said acts were based on any valid legal duties that Pape was carrying out. In fact, such acts were contrary to all legal duties Pape was subject to.

As to the facts in the *Screws* case, this court pointed out that the acts complained of were initiated by a lawful arrest (*i. e.*, an arrest on a warrant charging theft of a tire—325 U. S. 92); and further, that the defendants admitted that the assault and battery were committed to protect themselves, and to make the arrest effective, *i. e.*, to keep the prisoner from escaping which "was a duty they had under Georgia law" (p. 110); that, certainly, the defendants assumed and "pretended" to act under color of law, and that under "color" of law means under "pretense" of law (p. 111).

As to the facts in the *Williams* case, the defendants were convicted of employing brutal methods to extort confessions from persons suspected of theft. This court upheld the conviction by a 5 to 4 decision. This court held that the misconduct consisted not merely of a simple assault

and battery but of the infliction of violence to *extort a confession* (pp. 101-102). This court said that while the indictment charged that the "illegal" assault and battery constituted a deprivation of the victim's rights and privileges secured by the Fourteenth Amendment, it was clear from the context of the indictment, and from the particular misconduct charged, that the right charged to have been violated was "*immunity from the use of force and violence to obtain a confession*" (pp. 102-103—emphasis by this court). The case at bar does not involve violence to obtain a confession.

As to the law in the *Screws* case, in their dissenting opinion, Justices Robert, Frankfurter and Jackson (325 U. S. pp. 138-161), challenged the conclusion that conduct by state officials in defiance of state law constitutes action by the state or under "color of law". The minority opinion pointed out that the Fourteenth Amendment prohibits a state from so acting as to deprive persons of the new federal rights defined by it, but that action by state officials in direct contradiction to state law is not within federal protection but must be dealt with by the states alone (p. 141).

The minority opinion further pointed out that Congress never intended that federal authority should be exerted against offenders of state authority, whether such offenders be private persons or local officials (p. 142).

The three justices traced the history of civil rights statutes and concluded that "this legislation was confined to attempted deprivations of federal rights by state law and was not extended to breaches of state law by its officials * * *." (p. 143.)

The minority opinion then declared (p. 144):

"* * * And to have provided for the National Government to take over the administration of criminal

> justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house * * * a Federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our Federal system was plainly not contemplated * * *."

The minority opinion further pointed out (pp. 147-148):

> "* * * It has never been satisfactorily explained, how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of the State."

As to the law in the *Williams* case, the conviction for extorting a confession by violence was upheld by a 5 to 4 decision. Justices Jackson, Frankfurter, and Minton dissented on the grounds: (1) that Section 20 prescribed a standard of liability too vague for validity; and (2) that the statute was never designed to cover a wrongful use of power by a state official.

Acts of violence by police officers to extort a confession are against the laws of Illinois. Such a confession is not admissible in evidence. Since it is not admissible in evidence, the person from whom it was extorted is protected by the laws of Illinois. Therefore, the State of Illinois has not deprived him of any rights guaranteed by the Fourteenth Amendment. The illegal acts of the offending police officers violated his rights but could not under any circumstances deprive him of his rights.

This difference between violation of rights and deprivation of rights by state action must be kept in mind at all times. It is the confusing of "violation" with "deprivation" by state action by judicial decision, that has er-

roneously extended federal jurisdiction to actions that belong solely to the states.

Petitioners have mistakenly assumed that the "violation of rights" by wrongful conduct and the "deprivation of rights by state action" are the same. They have devoted most of their brief to this confused theory. They think that any violation by a police officer of a right guaranteed by the Fourteenth Amendment is tantamount to a deprivation of such right by state action. This is not so.

Perhaps petitioners' rights were invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the laws of Illinois and the ordinances of Chicago, have been or could be denied, or impaired. Nor could petitioners be deprived of such rights by totally illegal action.

Petitioners' Point 1 (Petitioners' Brief, p. 10) states:

> "The Fourteenth Amendment Due Process Rights of Petitioners Were Violated by the Unreasonable Search and Seizure Alleged in the Complaint."

This statement is erroneous because respondent Pape seized nothing belonging to petitioners and there is no allegation in petitioners' complaint stating any seizure. Besides, the statement states no cause of action under the Civil Rights Act, 42 U. S. C. A. sec. 1983, because a "violation" of due process rights is not protected by such act. Section 1983 protects against state action resulting in "deprivation" of due process rights.

Petitioners seek to impress this court with the importance of civil rights and their need for protection. Respondents have no quarrel with such sentiments but the issue in this case is not the importance of civil rights and their protection but whether acts of a police officer in violation of state and city law is state action protected by the Fourteenth Amendment.

Respondents submit that this court should follow the minority opinion of the *Screws* and *Williams* cases, which is supported by the civil rights cases decided before them and heretofore shown, and hold that conduct by state officials, police or otherwise, in defiance of the Constitution and laws of Illinois and the ordinances of Chicago, does not constitute State action or action under color of law or pretense of law against which the Fourteenth Amendment and the Civil Rights Act are directed.

Petitioners' Point 2 (Petitioners' Brief, p. 13) states:

> "The Availability of State Judicial Remedies for the Wrongs Alleged in the Complaint Does Not Bar Petitioners' Federal Remedy Conferred by the Civil Rights Act."

Petitioners then state (Petitioners' Brief, p. 13) that respondents (Brief in Opposition to Cert., pp. 4, 9) and the court below seem to urge that the availability of a state tort remedy somehow bars petitioners from obtaining redress under the Civil Rights Act.

This is an erroneous statement of respondents' position and an attempt by petitioners to cloud the issue. In respondents' Brief in Opposition to Certiorari, p. 4, respondents stated:

> "Petitioners are trying to establish a federal forum for matters that belong in a state court where complete redress is available.
>
> "If petitioners were to prevail, then every false arrest, unreasonable search, and false imprisonment would become a Civil Rights Act cause of action. This court in *Snowden v. Hughes*, 321 U. S. 1, 11, has disclaimed such intention for the Civil Rights Act . . ."

Respondents' Brief in Opposition to Certiorari, p. 9, further states:

> "Respondents have shown that the petitioners' com-

plaint does not state a cause of action under the Civil Rights Act * * *.

"Petitioners' remedy, if any, as stated by the Appeals Court (Petition, p. 16) is in the state courts."

Respondents have always contended that petitioners' complaint does not state a Civil Rights Act cause of action but merely an action under state law. This contention is entirely dissimilar from petitioners' claim regarding respondents' position on the availabilty of a state cause of action.

Petitoners' argument is irrelevant and immaterial to the issue herein.

Petitioners' Point 3 (Petitioners' Brief, p. 16) deals with "specific intent". Although petitioners allege that respondents have never raised this omission as a defense, petitioners discuss it because it was an important issue in *Screws* v. *United States*, 325 U. S. 91, (Petitioners' Brief, p. 16). Even if respondents did not raise the issue of "specific intent" below and even if petitioners had not introduced it into this case, respondents have the right to raise it now, as an appellee may urge anything shown by the record to sustain the judgment.

The *Screws* decision squarely holds that a statute which imposes liability for violations of rights guaranteed by the due process clause of the Fourteenth Amendment is subject to serious constitutional attack on the ground of vagueness, *unless "willfulness" in the commission of the wrong is included as an ingredient of responsibility.* While it is true that the *Screws* case involved a criminal statute, whereas the case at bar involves a civil statute, the principle of the *Screws* decision is nevertheless applicable here, because the *Screws* case held that without the word "willfully" the statute was too vague to apprise a person in advance of taking action whether his conduct would fall within or without the ambit of legality.

Not only criminal statutes, but civil statutes as well, have been held void for prescribing standards so vague and indefinite that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application (*Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 242; *Boshuizen* v. *Thompson & Taylor Co.*, 360 Ill. 160, citing numerous decisions of this court at page 169).

Another reason why the above rule applies both to civil and criminal statutes is that the question of vagueness or indefiniteness is not related to the difference in the degree of proof required for liability but pertains to the underlying issue of whether the statute has been violated at all. Without a definite standard, the decision of liability must be left to the differing views of courts and juries as each particular case arises. This vice is equally destructive of constitutional rights whether it exists in a civil statute or in a criminal statute.

Petitioners state (Petitioners' Brief, p. 18), "In any event, the rule of *Screws* is a rule of proof, not of pleading. No specific intent was laid in the *Screws* indictment. See 325 U. S. at 93."

Petitioners are playing on words. In 325 U. S. 93, this court said:

> "The indictment charged that petitioners, acting under color of the laws of Georgia, 'willfully' caused Hall to be deprived of 'rights, privileges, or immunities secured or protected' * * *."

The use of the word "willfully" in the indictment laid the basis for the proving of "specific intent". Without the word "willfully" in both the indictment and statute, under which the indictment was had, neither the statute nor indictment would have been valid (325 U. S. 101, 103).

B.

The allegations of the complaint as to custom or usage are substantially insufficient in law.

In their brief, petitioners fail to set forth any customs or usages under which respondent Pape acted. They cannot set forth any because there are none.

Petitioners' failure to argue custom or usage makes it unnecessary for respondents to do so. However, we believe it important to argue the point.

The complaint states (par. 17, R. 8) "At all times herein mentioned, it was, and it is now, the custom or usage of the Police Department of the City of Chicago" (setting forth supposedly illegal acts).

The complaint also states, (par. 7, R. 7) that the imprisonment of petitioner James Monroe was committed pursuant to the custom and usage alleged in par. 17.

The alleged customs and usages are so preposterous in themselves that this court might well take judicial notice of their nonexistence, especially in view of the express provisions of the state constitution and statutes and city ordinances, heretofore shown, to the direct contrary of such alleged customs and usages.

To treat the allegations of custom and usage as well pleaded requires the assumption of a complete breakdown of law and order in the City of Chicago at the time in question, October 29, 1958 (R. 3). This is contrary to common knowledge, and it is well settled that courts will take judicial notice of matters of common knowledge (31 C. J. S., Evidence, sec. 9, p. 510). Allegations of fact contrary to common knowledge and contrary to what a court will judicially notice, will not be sustained.

Thus the allegations as to custom and usage are not well pleaded because: (1) they are repugnant to the Constitu-

tion and statutes of Illinois and the ordinances of Chicago; and (2) they are contrary to facts of common knowledge within the judicial notice of courts.

It is well settled that a custom or usage directly repugnant to the express provisions of a statute or ordinance is void (*Wolfe* v. *Shell Petroleum Corp.*, 10 Cir., 83 F. 2d 425, 431).

It has also been held that proof of a custom which is repugnant to a statute is not admissible in evidence (*Central R. Co. of New Jersey* v. *Sekick*, 3 Cir., 38 F. 2d 968, 971; 25 C. J. S., Customs and Usages, sec. 10b, p. 91).

In *United States ex rel. Bongiorno* v. *Ragen*, 7 Cir., 146 F. 2d 349, 352, cert. den. 325 U. S. 865, the court took judicial notice that no state of public hysteria against crime existed in Chicago between July and October, 1933, which would deprive one accused of murder of due process of law.

This court may properly take judicial notice of the fact that no such reprehensible customs or usages as are set forth in the complaint existed in Chicago on October 29, 1958.

The complaint does not allege that police officers are able to commit with impunity the acts petitioners allege were committed by respondent Pape. Nor does the complaint allege that petitioners will be unable to obtain full redress in the local courts for the alleged wrongs inflicted upon them. That such redress is open to petitioners is heretofore shown by the Constitution and statutes of Illinois and ordinances of Chicago.

The allegations of the complaint as to custom and usage cannot be sustained for the further reason that they are not averred to have been of general notoriety within Chicago or Illinois, nor are any facts set forth from which such general notoriety can be inferred. Moreover, the

complaint does not allege that respondent Pape had knowledge of any of said customs or usages.

In *Langdon* v. *Kennedy*, 118 Neb. 290, 296, it was held that a custom or usage is insufficiently alleged by an averment that such a custom and usage existed, without alleging also that knowledge of the custom and usage on the part of the person charged with having acted pursuant thereto, or without setting forth facts showing such custom and usage to be of general notoriety.

25 C. J. S., Customs and Usages, sec. 32b, p. 125, states:

> "Where it becomes necessary to plead a custom or usage, all the essentials requisite to its validity and binding effect must be averred. Hence, the pleading should either aver knowledge on the part of the person to be charged or allege facts authorizing the conclusion that it was of such general notoriety that he will be presumed to have knowledge."

In the light of the foregoing, it is clear that the allegations of the complaint as to custom and usage are not well pleaded and should not be sustained.

II.

Petitioners' complaint fails to show that respondent City of Chicago committed any act that would make it liable under the Civil Rights Act.

Petitioners have devoted over 40 pages of their brief (Petitioners' Brief, pp. 21-65) attempting to prove that the respondent City of Chicago is liable under the Civil Rights Act for the actions of its police. Most of petitioners' argument centers around governmental immunity.

The question of governmental immunity does not enter into this case.

Section 1-15 of the Illinois Revised Cities and Villages Act (Ill. Rev. Stat. 1959, chap. 24, par. 1-15) provides in part:

> "In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his duties as policeman, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as the result of such injury, *except where the injury results from the wilful misconduct of the policeman*" (Emphasis added).

Under the foregoing statute of Illinois, the City of Chicago is liable for judgments against its police arising out of the performance of their police duties except when such police are guilty of "wilful misconduct." Such statute removed from Chicago governmental immunity for the acts of its police except when such acts are the result of "wilful misconduct."

Such statute is in conformity with the rule:

> "• • • a municipality is not liable for the acts of its policemen which are ultra vires and not within the scope of their functions. 'i.e. for the unlawful acts committed ultra vires, and not *colore officii*, in the known and wilful violation of law' " (McQuillen Mun. Corps., 3rd ed. (1950) Police Officers, sec. 53.79, p. 358).

Petitioners seek to avoid the rule of law that a municipality is not responsible for the acts of its police which are contrary to laws designed to prevent such acts on the grounds that such acts are ultra vires and beyond the scope of police employment by claiming that, "• • • There

is no longer any doubt that when an officer of the state is engaged in his official duties, his act is the state's act for purposes of the Fourteenth amendment and for purposes of the Civil Rights Act. *Screws* v. *United States*, 325 U. S. 91; *Williams* v. *United States*, 341 U. S. 97." (Petitioners' Brief, p. 51).

The *Screws* and *Williams* cases did not hold the rule set forth by petitioners. These cases hold that the acts of a state officer were under "color of law" or "pretense of law."

The holdings in those cases did not touch on municipal liability, but were confined to the liability of the individual defendants.

If this court holds the *Screws* and *Williams* cases inapplicable or overrules them on the grounds we have heretofore set forth, then the liability of Chicago will not have to be decided because no Civil Rights Act cause of action exists.

If this court does not so hold, and adopts petitioners' theory that the act of respondent Pape, no matter how wrongful and how violative of the Constitution and laws of Illinois and the ordinances of Chicago, binds Chicago and makes it directly liable therefor, then Chicago and every other municipality in the United States is open to Civil Rights Act liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of.

Such liability would amount to depriving Chicago and every municipality of its property without due process of law. It would establish a theory that municipalities, no matter how innocent of wrongdoing they might be, and no matter what ordinances they might enact, or laws their state might enact to prevent police from wrongdoing, would be liable for the wrongful acts of their police.

Such municipal liability would also encourage unlawful police conduct because the victim of such conduct would not seek to hold the policeman liable but the municipality. It would encourage collusion between individuals and the police to the financial detriment of the municipality. Venal policemen would be encouraged to commit unlawful acts knowing suit would be filed against the municipality instead of them.

The case at bar is now before this court, evidently because different circuits of the United States Courts of Appeals have differed on the proposition of whether every act of an officer of the state is the state's act for purposes of the Civil Rights Act. Petitioners have assumed the question in issue and left nothing for this court to decide.

Petitioners by introducing extraneous matter not of record (Petitioners' Brief, p. 58) seek to introduce in this case an irrelevant issue. They attempt to show that federal courts will not be inconvenienced by accepting police tort cases as Civil Rights Act cases because of the small number of such cases filed in federal courts. We suggest that the small number of such cases filed in federal courts is due to the fact that the bar recognizes that such cases are not Civil Rights Acts cases but state cases.

In order to bolster their immaterial argument that suits against police officers of Chicago would not be a financial hardship on Chicago, petitioners libel the police department of Chicago by quoting a derogatory statement from a magazine about the police department (Petitioners' Brief, p. 62). Respondents object to such quote, first, because it is not true and, second, because it is not part of the record.

In furtherance of their immaterial argument, petitioners state that in 1959 the police of Chicago made 207,000 physical arrests and that only 31 suits were filed as a re-

sult thereof (Petitioners' Brief, p. 62). Only 31 suits from 207,000 arrests certainly shows that the police of Chicago are performing their police duties legally and efficiently and belies petitioners' quoted magazine statement.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, striking petitioners' complaint and dismissing the suit, be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

JAMES MONROE, ET AL.,

Petitioners,

vs.

FRANK PAPE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS

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PETITIONERS' REPLY BRIEF.

ARGUMENT.

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1. THE "COLOR OF LAW" ISSUE.

For the first time since this case was filed in the District Court below, respondents have raised the contention that their acts were not committed "under color of any statute, ordinance, [or] regulation . . . of any State" within the meaning of R.S. § 1979. (Respondents' Brief, p. 4.) Respondents argue that Deputy Chief of Detectives Pape and, by implication, his twelve Detective Bureau subordinates "occupied the status of a private tortfeasor" (Brief, p. 7) when they burst into the Monroe home, ran-

sacked the premises, arrested James Monroe, took him to the Central Police Headquarters of the Chicago Police Department and held him there for interrogation and lineup exhibition for ten hours.

It is, of course, uncontroverted that the police officers were *on duty* at the time they did these acts. (R. 1-2.) It is nowhere intimated in the record or the briefs that respondents were off on a frolic of their own, or that for some private, personal reason they were feuding with the Monroe family. It is crystal clear that these respondents were detectives employed by the City of Chicago to make investigations and arrests and that this is precisely what they were doing in this instance. With commendable candor, respondents have set forth in their brief the municipal ordinances "under color" of which they acted. (Brief, pp. 5-6; Municipal Code of Chicago, §§ 11-24, 11-25.)

Despite these facts, respondents suggest that (1) the acts of the police in this case were not "state action" for Fourteenth Amendment purposes, and (2) they were not acts done "under color of law" within the meaning of the Civil Rights Act. In each instance, respondents' theory seems to be that unless there exists "a law of the state or city authorizing such misconduct" then no Federal violation has occurred. (Brief, p. 7.)

The Fourteenth Amendment "state action" aspect of respondents' argument was rejected eighty years ago by *Ex Parte Virginia*, 100 U.S. 339, 347 (1880).

The Civil Rights Act "color of law" aspect of respondents' argument was rejected twenty years ago in *United States* v. *Classic*, 313 U.S. 299, 326 (1941). It was rejected again in *Screws* v. *United States*, 325 U.S. 91, 107-108, 109-10 (1945) after exhaustive analysis and debate. It

was rejected again in *Williams* v. *United States*, 341 U.S. 97, 99-100 (1951) where this Court reaffirmed the doctrine of *Screws*, upon being urged to overrule it.

The wrongful acts committed by the State officers in *Classic*, *Screws*, and *Williams* were, in each instance, clear violations of the laws of Louisiana, Georgia and Florida, respectively. Yet in each instance this Court held that these wrongful acts were done "under color of law," because:

> "In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused."
>
> *Screws* v. *United States*, 325 U.S. 91, 110 (1945).

It is clear that officers of the Detective Bureau have the officially imposed duty and responsibility of making criminal investigations and arrests, of searching for evidence of crime, and of interrogating witnesses and suspects about criminal offenses. When their acknowledged powers are abused in the course of their performance of these official duties, then they have acted "under color of law" within the meaning of R.S. § 1979, of *Classic*, of *Screws*, and of *Williams*.

Respondents have pointed to nothing which has occurred in the past decade which casts doubt on the wisdom of this Court's decisions in *Screws* and *Williams*. Respondents advance no policy arguments whatsoever in support of their plea for repudiation of these cases. But there are significant reasons of policy why this Court should adhere to and reaffirm *Screws* and *Williams*.

First: The "color of law" holdings in *Screws* and *Williams* were matters of statutory construction. Had Congress disagreed with these holdings it could have amended the statute. Indeed, the *Screws* majority actually invited

Congress to do so, if it disagreed with the *Screws* holding:

> "We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent reexamination. The meaning which the Classic Case gave to the phrase 'under color of any law' involved only a construction of the statute. *Hence if it states a rule undesirable in its consequences, Congress can change it.*" (Emphasis supplied.)
>
> *Screws* v. *United States*, 325 U.S. 91, 112-13 (1945).

Congress did not change it. The extensive Civil Rights Act revisions of 1957 and 1959 left the "color of law" phraseology of R.S. § 1979 and 18 U.S.C. § 242 untouched. What was true in 1945 when *Screws* was decided is even more true today:

> "We add only to the instability and uncertainty of the law if we revise the meaning of [the Act] to meet the exigencies of each case coming before us."
>
> *Screws* v. *United States*, 325 U.S. 91, 113 (1945).

Second: A substantial portion of the work of the Civil Rights Division of the Justice Department will have to be abandoned if *Screws* and *Williams* are repudiated. If these decisions are overruled on the "color of law" point, enforcement of the criminal as well as the civil sanctions of the Act will be stopped in its tracks in many instances. The Justice Department's generation-old policy, inaugurated under Attorney General Frank Murphy, of criminal prosecutions in selected instances of particularly brutal police misconduct will be doomed, because the "color of law" holding here must control the meaning of the similar phrase in 18 U.S.C. § 242—the statute which is the basis of the Justice Department program in the

civil liberties area. Cases such as the recent *Pool* v. *United States*, 260 F.2d 57 (9th Cir. 1958) would be impossible. An important Federal law enforcement program would be completely disrupted.

2. THE OTHER ISSUES RAISED BY RESPONDENTS.

The remaining points raised by respondents were anticipated in petitioners' opening brief. It is, however, worthy of note that in their entire brief, respondents have not advanced a single policy argument in support of their various positions, with the exception of the following incredible paragraph (Brief, p. 27):

> "Such municipal liability would also encourage unlawful police conduct because the victim of such conduct would not seek to hold the policeman liable but the municipality. It would encourage collusion between individuals and the police to the financial detriment of the municipality. Venal policemen would be encouraged to commit unlawful acts knowing suit would be filed against the municipality instead of them."

We cannot believe that this contention is serious. It is, to us, inconceivable that any significant number of police officers, even in Chicago, would collude with unscrupulous would-be plaintiffs to "frame-up" constitutional violations, air the faked abuse in a District Court of The United States, procure a judgment based on perjured testimony, and later divide the swag.

3. NEW MATTERS.

1. Since the filing of petitioners' opening brief, the Federal Reporter advance sheet for October 31, 1960 has been published. It contains the report of *Cohen* v. *Cahill*,

281 F.2d 879 (9th Cir. 1960), in which, on facts similar to those at bar, the Ninth Circuit said (p. 880):

> "Clearly, the allegations of the complaint . . . state a cause of action cognizable by the District Court under [R.S. § 1979]."

• • •

2. At pages 60-61 of our opening brief, we summarized the responses of the attorneys for 19 cities to inquiries concerning the number of civil suits filed against police officers of their cities during the past twelve months. We have since received additional responses from the cities of Buffalo, New York; Honolulu, Hawaii; Minneapolis, Minnesota; and Seattle, Washington. These responses have been lodged with the Clerk of this Court. Copies have been served upon counsel for respondents. The total responses to date are summarized in the following table. Cities from which no responses have been obtained are listed in the table but, of course, no information concerning them is included in the "Suits Filed" column.

City	*Suits Filed Within Past Twelve Months*
Atlanta, Ga.	
Baltimore, Md.	
Birmingham, Ala.	
Boston, Mass.	
Buffalo, N.Y.	7 suits in 1959; 9 suits in 1960 to July 1 ("a marked increase.")
Charleston, S.C.	
Charlotte, N.C.	1 suit within ". . . past several years."
Cincinnati, Ohio	1 suit in 1959.
Cleveland, Ohio	
Columbus, Ohio	2 suits. (". . . average. . . .")
Dallas, Texas	
Denver, Colo.	2 suits. (". . . this type of situation is not a problem.")
Des Moines, Ia.	
Hartford, Conn.	"Seven suits presently pending."
Honolulu, Ha.	3 new suits during past 12 months. (". . . about average. . . .")
Houston, Texas	
Indianapolis, Ind.	
Jackson, Miss.	
Jacksonville, Fla.	
Jersey City, N.J.	
Kansas City, Mo.	"No suits filed."
Los Angeles, Cal.	
Memphis, Tenn.	
Miami, Fla.	

Milwaukee, Wisconsin	9 cases 58-59 fiscal year. 9 cases 59-60 fiscal year.
Minneapolis, Minn.	3 suits pending; 1 suit filed within past 12 months (". . . rather a rarity in our jurisdiction. . . .")
Mobile, Ala.	
Montgomery, Ala.	
New Bedford, Mass.	
New Orleans, La.	
New York, N.Y.	
Newark, N.J.	
Oklahoma City, Okla.	1 suit.
Omaha, Neb.	1 suit (". . . very few. . . .")
Philadelphia, Pa.	
Phoenix, Ariz.	
Pittsburgh, Pa.	
Portland, Maine	"No cases in 15 years."
Portland, Oregon	
Providence, R.I.	
Reno, Nev.	"No cases."
Richmond, Va.	
Rochester, N.Y.	9 suits.
St. Louis, Mo.	
St. Paul, Minn.	"No suits."
Sacramento, Cal.	
Salt Lake City, Utah	"No suits."
San Francisco, Calif.	

Seattle, Wash.	7 suits in last 12 months. ("... slight increase. ...")
Spokane, Wash.	"2 cases in 10 years."
Syracuse, N.Y.	
Tulsa, Okla.	"No suits."
Washington, D.C.	"3 suits," no change in volume.
Wichita, Kan.	"No suits."

• • •

3. The most recent public statement on the subject of search warrants by a ranking Chicago police official is reproduced as an Appendix to this Reply Brief.

Respectfully submitted,

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APPENDIX

CHICAGO DAILY NEWS, Mon., Sept. 19, '60 * 15

Hassle Over Warrants In Cop Gambling Raids

'Handcuffed,' Say Police; At Odds with Prosecutor

BY EDMUND J. BOONEY

A hassle was developing Monday between Chicago police and the state's attorney's office over the use of search warrants for gambling raids.

Lt. William Graham, chief of the police gambling unit, said he isn't going to use search warrants because they "handcuff" law enforcement.

Frank Ferlic, first assistant state's attorney, said that's no way to get gambling convictions.

"Graham is wrong," said Ferlic. "Under law he should get warrants if at all possible. He is not doing his duty when he fails to try to get warrants."

• • •

GRAHAM said, "If we have to proceed by the search warrant, we will be handcuffed in enforcing the gambling laws of Illinois.

"What I want is a warrant for 'probable cause' of gambling. Now, we have to have personal knowledge of a crime in order to get a warrant."

He contended that it is sometimes impossible to get personal information about a gambling place without tipping off the gamblers.

He conceded that warrants are usually necessary for gambling convictions, but declared, "We will get along without them if we have to."

• • •

HE SAID convictions aren't the most important thing anyway.

"The big thing is: We hit the gamblers where it hurts —their pocketbooks. It's not a matter of conviction. When we arrest them, we take their telephones, equipment and, most important, their records.

"We turn over their records to the Internal Revenue Service and it slaps the gamblers with an income tax. And, all the time, we keep them moving out by banging away at them."

• • •

GRAHAM'S squad has come under fire in Municipal court because it has made raids without warrants. Five cases were thrown out last week, Graham said, because the judge ruled the arrests were invasions of privacy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

JAMES MONROE, ET AL.,
Petitioners,

vs.

FRANK PAPE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE ATTACHED SUPPLEMENTAL BRIEF FOR PETITIONERS.

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The Scheffer Press, Inc.—ANdover 3-6,50

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF PRESENTING NEW AUTHORITIES.

Petitioners respectfully move the Court for special leave, pursuant to Rule 41 (6) of this Court, to file the attached Supplemental Brief calling the Court's attention to a single late authority: this authority was not in existence until January 27, 1961, and did not come to counsel's attention until publication of *United States Law Week* for February 14, 1961. Counsel conceive it their duty to the Court to call this new authority to the Court's

attention at the earliest possible moment, and therefore pray leave to file the attached Supplemental Brief.

Respectfully submitted,

Petitioners James Monroe, *et al.*,

By .....

DONALD PAGE MOORE,
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One of the Attorneys for Petitioners.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

On January 27, 1961, the Supreme Court of California decided *Muskopf* v. *Corning Hospital District*. The first generally available report of this decision appeared in 29 *United States Law Week* 2366 (Feb. 14, 1961) which reached counsel's office in Chicago on February 15, 1961.

The *Muskopf* case appears to have abolished the defense of sovereign immunity in California insofar as that defense might be applicable to the facts in the present case. (*Cf.* the explanation of *Muskopf* in the companion case of *Lipman* v. *Brisbane Elementary School District*, 29 *Law Week* 2367 [Jan. 27, 1961].)

At pages 36-40 of our opening brief in this Court, we point to the remarkable fervor and unanimity of recent denunciations of the sovereign immunity doctrine by courts and scholars. The *Muskopf* opinion is an important recent addition to this swelling tide of criticism. California has now said:

> "After a re-evalution of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust. . . .
>
> . . . .
>
> "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . .
>
> . . . .

"None of the reasons for its continuance can withstand analysis. . . ."

Muskopf v. *Corning Hospital District*, 29 *Law Week* 2366.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1960.

James Monroe, et al., Petitioners, v. Frank Pape, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 20, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents important questions concerning the construction of R. S. § 1979, 42 U. S. C. § 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant

and that they acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and of the City of Chicago. Federal jurisdiction was asserted under R. S. § 1979, which we have set out above and 28 U. S. C. § 1343[1] and 28 U. S. C. § 1331.[2]

The City of Chicago moved to dismiss the complaint on the ground that it is not liable under the Civil Rights Acts, nor for acts committed in performance of its governmental functions. All defendants moved to dismiss, alleging that the complaint alleged no cause of action under those Acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F. 2d 365, relying on its earlier decision, *Stift* v. *Lynch*, 267 F. 2d 237. The case is here on a writ of certiorari which we granted because of a seeming conflict of that ruling with our prior cases. 362 U. S. 926.

I.

Petitioners claim that the invasion of their home and the subsequent search without a warrant and the arrest

[1] This section provides in material part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Subsection (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

In their complaint, petitioners also invoked R. S. §§ 1980, 1981, 42 U. S. C. §§ 1985, 1986. Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by § 1979. Accordingly, only that section is before us.

and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution" within the meaning of R. S. § 1979. It has been said that when 18 U. S. C. § 241 made criminal a conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution," it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. *United States* v. *Williams*, 341 U. S. 70. Cf. *United States* v. *Cruikshank*, 92 U. S. 542; *Ex parte Yarborough*, 110 U. S. 651; *Guinn* v. *United States*, 238 U. S. 347. But the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation.

Section 1979 came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment.[3] Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the promises of the civil rights bill,[4] which has since become a part of the Constitution," [5] *viz.*, the Fourteenth Amendment.

Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and

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[3] See Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83–85.

[4] Act of April 9, 1866, 14 Stat. 27.

[5] *Supra*, note 3, 568.

for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. § 1979. See *Douglas* v. *Jeannette*, 319 U. S. 157, 161–162. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Wolf* v. *Colorado*, 338 U. S. 25; *Elkins* v. *United States*, 364 U. S. 206, 213.

II.

There can be no doubt at least since *Ex parte Virginia*, 100 U. S. 339, 346–347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287–296. The question with which we now deal is the narrower one of whether Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams* v. *United States*, 341 U. S. 97; *Screws* v. *United States*, 325 U. S. 91; *United States* v. *Classic*, 313 U. S. 299. We conclude that it did so intend.

It is argued that "under color" of enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, state usage to do what he did. In this case it is said that these policemen, in breaking into petitioners' apartment, violated the Constitution[4] and laws of Illinois. It is

[4] Illinois Const., Art. II, § 6, provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall

pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioner that full redress which the common law affords for violence done to a person; and it is earnestly argued that no "statute, ordinance, regulation, custom or usage" of Illinois bars that redress.

The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading:

> "A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . ."[7]

The legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

First, it might, of course, override certain kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that

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not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." Respondents also point to Ill. Rev. Stat., c. 38, §§ 252, 449.1; Chicago, Illinois, Municipal Code, § 11-40.

[7] Cong. Globe, 42d Cong., 1st Sess., p. 244.

object and emphasized that it was irrelevant because there were no such laws: [9]

> "The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people."

Second, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:

> ". . . it is said the reason is that any offence may be committed upon a negro by a white man and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because United States courts enforce the United States laws by which negroes may testify." [10]

But the purposes were much broader. The *third* aim was to provide a federal remedy though the state remedy, adequate in theory, was not available in practice. The opposition to the measure complained that "it overrides the reserve powers of the States," [11] just as they argued that the second section of the bill "absorb[ed] the entire

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[9] *Id.*, App. 268.

[10] *Id.*, p. 345.

[11] *Id.*, p. 365. The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of § 1: "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error in judgment*, [he is liable] . . . ." *Ibid.* (Italics added.)

jurisdiction of the States over domestic and foreign affairs." [11]

This Act of April 20, 1871, sometimes called "the third force bill," was passed by a Congress that had the Klan "particularly in mind." [12] The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. [13] This report was drawn on by many of the speakers. [14] It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this "force bill." Mr. Lowe of Kansas said:

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." [15]

Mr. Beatty of Ohio summarized in the House the case for the bill when he said:

> ". . . certain states have denied to persons within their jurisdiction the equal protection of the laws.

[11] *Id.*, p. 366.
[12] Randall, The Civil War and Reconstruction (1937), p. 857.
[13] S. Rep. No. 1, 42d Cong., 1st Sess.
[14] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 166–167.
[15] *Id.*, p. 374.

> The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the state made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." [16]

While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan,[17] the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law. Senator Osborn of Florida put the problem in these terms: [18]

> "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State governments, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed."

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[16] *Id.*, p. 428.

[17] As Randall, *op. cit.*, *supra*, note 12, p. 855, says in discussing the Ku Klux Klan: "A friendly view of the order might represent it as an agency of social control in the South. Yet it never obtained the dignity of the vigilance committees of the western states nor of the committees of safety of Revolutionary times."

[18] Cong. Globe, 42d Cong., 1st Sess. 653.

There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. Speaking of conditions in Virginia, Mr. Porter of that State said: [19]

> "The outrages committed upon loyal men there are under the forms of law."

Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination: [20]

> "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

Mr. Hoar of Massachusetts stated: [21]

> "Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs

[19] *Id.*, App. 277.
[20] *Id.*, App. 315.
[21] *Id.*, p. 334.

> are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens."

Senator Pratt of Indiana spoke of the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws: [22]

> "Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.
>
> "But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency

[22] *Id.*, p. 505.

when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples."

It was precisely that breadth of the remedy which the opposition emphasized. Mr. Kerr of Indiana referring to the section involved in the present litigation said:

> "This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offenses committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexations and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subornation of perjury, more reckless and dangerous to society than the alleged offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South. The contrary will certainly be its effect."[23]

[23] *Id.*, App., p. 50. Mr. Golladay of Tennessee expressed the same concern:

"Is the great State of New York invaded every time a murder is committed within her bounds? Was the great State of Pennsylvania invaded when rioters in the city of Philadelphia burned a public building? Was the great State of Massachusetts invaded when Webster, one of her first scholars, within the walls of Harvard murdered Parkman, or later, when evil-disposed persons violated her laws in Lowell? Did they require the Army and Navy and martial law? And, sir, because a midnight murderer is sometimes found in the South it should not be regarded as an invasion." *Id.*, App. 160.

Mr. Voorhees of Indiana, also speaking in opposition, gave it the same construction: [24]

> "And now, for a few moments let us inspect the provisions of this bill, inspired as it is by the waning and decaying fortunes of the party in power, and called for, as I have shown, by no public necessity whatever. The first and second sections are designed to transfer all criminal jurisdiction from the courts of the States to the courts of the United States. This is to be done upon the assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law."

Senator Thurman of Ohio spoke in the same vein about the section we are now considering.[25]

> "It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States."

The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the

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[24] *Id.*, App. 179.
[25] *Id.*, App. 216.

enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Much is made of the history of § 2 of the proposed legislation. As introduced § 2 was very broad:

> ". . . if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony . . . ."

It was this provision that raised the greatest storm. It was § 2 that was rewritten so as to be in the main confined to conspiracies to interfere with a federal or state officer in the performance of his duties. 17 Stat. 13. Senator Trumbull said: [28]

> "Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guaranteed to them by the Constitution and laws of the

[28] *Id.*, p. 579.

United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State."

But § 1—the section with which we are here concerned—was not changed as respects any feature with which we are presently concerned.[27] The words "under color of" law were in the legislation from the beginning to the end. The changes hailed by the opposition—indeed the history of the evolution of § 2 much relied upon now—are utterly irrelevant to the problem before us, *viz.*, the meaning of "under color of" law. The vindication of States' rights which was hailed in the amendments to § 2 raise no implication as to the construction to be given to "color of law" in § 1. The scope of § 1—under any construction—is admittedly narrower than was the scope of the original version of § 2. Opponents of the Act,

[27] Section 1 in the bill as originally introduced read as follows:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases."

however, did not fail to note that by virtue of § 1 federal courts would sit in judgment on the misdeeds of state officers.[28] Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act. They found justification, however, for this extension in considerations such as those advanced by Mr. Hoar:[29]

> "The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority in numbers or strength in any State seek to deprive the remainder of the population of their civil rights."

Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws searches and seizures is no barrier to the present suit in the federal court.

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[28] See text at note 23, *supra*; see note 10, *supra*.

[29] Cong. Globe, 42d Cong., 1st Sess., pp. 334-335.

We had before us in *United States* v. *Classic*, *supra*, § 20 of the Criminal Code, 18 U. S. C. § 242,[30] which provides a criminal punishment for anyone who "under color of any law, statute, ordinance, regulation, or custom" subjects any inhabitant of a State to the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." Section 242 first came into the law as § 2 of the Civil Rights Act, Act of April 9, 1866, 14 Stat. 27. After passage of the Fourteenth Amendment, this provision was re-enacted and amended by §§ 18, 19, Act of May 31, 1870, 16 Stat. 140, 144.[31] The right involved in the *Classic* case was the right of voters in a primary to have their votes counted. The laws of Louisiana required the defendants "to count the ballots, to record the result of the count, and to certify the result of the election." *United States* v. *Classic*, *supra*, 325–326. But according to the indictment they did not perform their duty. In an opinion written by Mr. Justice (later Chief Justice) Stone, in which Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter joined, the Court ruled, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.*, 326. There was a dissenting opinion; but the ruling as to the meaning of "under color of" state law was not questioned.

That view of the meaning of the words "under color of" state law, 18 U. S. C. § 242, was reaffirmed in *Screws* v. *United States*, *supra*, 108–113. The acts there complained of were committed by state officers in performance of

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[30] Then 18 U. S. C. § 52.

[31] For a full history of the evolution of 18 U. S. C. § 242, see *Screws* v. *United States*, 325 U. S. 91, 98–100; *United States* v. *Classic*, 313 U. S. 299, 327, n. 10; cf. *Hague* v. *C. I. O.*, 307 U. S. 496, 509–510.

their duties, *viz.*, making an arrest effective. It was urged there, as it is here, that "under color of" state law should not be construed to duplicate in federal law what was an offense under state law. *Id.*, 138–149, 157–161. It was said there, as it is here, that the ruling in the *Classic* case as to the meaning of "under color of" state law was not in focus and was ill-advised. *Id.*, 146–147. It was argued there, as it is here, that "under color of" state law included only action taken by officials pursuant to state law. *Id.*, 141–146. We rejected that view. *Id.*, 110–113, 114–117 (concurring opinion). We stated

> "The construction given § 20 [18 U. S. C. § 242] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of §20 [18 U. S. C. § 242] to meet the exigencies of each case coming before us." *Id.*, 112–113.

We adhered to that view in *Williams* v. *United States*, *supra*, 99.

Mr. Shellabarger, reporting out the bill which became the Ku Klux Act, said of the provision with which we now deal:

> "The model for it will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' . . . This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights . . . ." [32]

Thus, it is beyond doubt that this phrase should be accorded the same construction in both statutes—in § 1979 and in 18 U. S. C. § 242.

Since the *Screws* and *Williams* decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken "under color of law or otherwise." [33] A vigorous minority report was filed attacking, *inter alia*, the words "or otherwise." [34] But not a word of criticism of the phrase "under color of" state law as previously construed by the Court is to be found in that report.

Section 131 (c) of the Act of September 9, 1957, 71 Stat. 634, 637, amended 42 U. S. C. § 1971 by adding a new subsection which provides that no person "whether acting under color of law or otherwise" shall intimidate any other person in voting as he chooses for federal officials. A vigorous minority report was filed [35] attacking the wide scope

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[32] Cong. Globe, 42d Cong., 1st Sess., App. 68.

[33] H. R. Rep. No. 2187, 84th Cong., 2d Sess., p. 16.

[34] *Id.*, p. 26.

[35] H. R. Rep. No. 291, 85th Cong., 1st Sess., pp. 24–60.

of the new subsection by reason of the words "or otherwise." It was said in that minority report that those words went far beyond what this Court had construed "under color of law" to mean.[36] But there was not a word of criticism directed to the prior construction given by this Court to the words "under color of" law.

The Act of May 6, 1960, 74 Stat. 86, uses "under color of" law in two contexts, once when § 306 defines "officer of election" and next when § 601 (a) gives a judicial remedy on behalf of a qualified voter denied the opportunity to register. Once again there was a Committee report containing minority views.[37] Once again no one challenged the scope given by our prior decisions to the phrase "under color of" law.

If the results of our construction of "under color of" law were as horrendous as now claimed, if it were as disruptive of our federal scheme as now urged, if it were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.

We conclude that the meaning given "under color of" law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it.

In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U. S. 103. We do not think that gloss should be placed on § 1979 which we have here. The word "wilfully" does not appear in § 1979. Moreover, § 1979 pro-

[36] *Id.*, pp. 57–58.

[37] H. R. Rep. No. 956, 86th Cong., 1st Sess., pp. 32–42.

vides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

So far then the complaint states a cause of action. There remains to consider only a defense peculiar to the City of Chicago.

III.

The City of Chicago asserts that it is not liable under § 1979. We do not stop to explore the whole range of questions tendered us on this issue at oral argument and in the briefs. For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of § 1979.

When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city, or parish" in which certain acts of violence occurred under the duty "to pay full compensation" to the person damaged or his widow or legal representative.[38] The amendment was adopted

[38] Cong. Globe, 42d Cong., 1st Sess., p. 663. The proposed amendment read:

"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by an persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living,

by the Senate.[39] The House, however, rejected it:[40] The Conference Committee reported another version.[41] The House rejected the Conference report.[42] In a second conference the Sherman amendment was dropped and

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or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction."

[39] *Id.*, 704–705.

[40] *Id.*, 725.

[41] "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any person riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if

[*Footnote 42 is on p. 22*]

in its place § 6 of the Act of April 20, 1871, was substituted.[6] This new section, which is now R. S. § 1981, 42 U. S. C. § 1986, dropped out all provision for municipal liability and extended liability in damages to "any person or person having knowledge that any" of the specified wrongs are being committed. Mr. Poland, speaking for the House Conferees about the Sherman proposal to make municipalities liable said:

> "We informed the conference on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree." [7]

The objection to the Sherman amendment stated by Mr. Poland was that "the House had solemnly decided that in their judgment Congress had no constitutional power to

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not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations, and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment."

[6] Cong. Globe, 42d Cong., 1st Sess., 800-801.

[7] *Id.*, 804.

[8] *Id.*, 804.

impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." [9] The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative."

Much reliance is placed on the Act of February 25, 1871, 16 Stat. 431, entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress; and Rules for the Construction thereof." Section 2 of this Act provides that "the word 'person' may extend and be applied to bodies politic and corporate." [10] It should be noted, however, that this definition is merely an allowable, not a mandatory, one. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective," and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level." [11] We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

[9] *Ibid.*

[10] See especially the comments of Senator Sherman. *Id.*, 820-821.

[10] This Act has been described as an instance where "Congress supplies its own dictionary." Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 536. The present codification defining "person" (1 U. S. C. § 1) does not in terms apply to bodies politic. See Reviser's Note, Vol. I, Rev. U. S. Stats. 1872, p. 19.

[11] See note, 109 U. of Pa. L. Rev. 1182, 1206–1212.

[11] See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 514. Cf. Fuller & Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437, 450.

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.* Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is

Reversed.

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* This has been the view of the lower federal courts. *Charlton* v. *City of Hialeah*, 188 F. 2d 421, 423; *Hewitt* v. *City of Jacksonville*, 188 F. 2d 423, 424; *Cobb* v. *City of Malden*, 202 F. 2d 701, 703; *Agnew* v. *City of Compton*, 239 F. 2d 226, 230; *Cuiksa* v. *City of Mansfield*, 250 F. 2d 700, 703–704. In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U. S. C. § 1983 were alleged. See, *e. g.*, *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Holmes* v. *City of Atlanta*, 350 U. S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from these cases.

SUPREME COURT OF THE UNITED STATES

No. 39.—October Term, 1960.

James Monroe, et al., Petitioners, v. Frank Pape, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 20, 1961.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

Were this case here as one of first impression, I would find the "under color of any statute" issue very close indeed. However, in *Classic*[1] and *Screws*[2] this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioner here.

From my point of view, the policy of *stare decisis*, as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear beyond doubt from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified. Since I can find no such justifying indication in that legislative history, I join the opinion of the Court.

[1] 313 U. S. 299.

[2] 325 U. S. 91.

[3] The provision is now found in 42 U. S. C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

However, what has been written on both sides of the matter makes some additional observations appropriate.

Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers DOUGLAS and FRANKFURTER in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the Court's opinion that:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies. . . . ."

without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to "custom, or usage." One can agree with my Brother FRANKFURTER, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern. If attention is directed at the rare specific references to isolated abuses of state authority, one finds them neither so clear nor so disproportionately divided between favoring the positions of the majority or the dissent as to make either position seem plainly correct.[1]

[1] Compare Cong. Globe, 42d Cong., 1st Sess. 504 (Senator Pratt), and *id.*, at App. 50 (Rep. Kerr); with Cong. Globe, 41st Cong., 2d Sess. 3663 (Senator Sherman), Cong. Globe, 42d Cong., 1st Sess. 697 (Senator Edmunds), *id.*, at App. 68 (Rep. Shellabarger), and Cong. Globe, 39th Cong., 1st Sess. 1758 (Senator Trumbull).

Besides the inconclusiveness I find in the legislative history, it seems to me by no means evident that a position favoring departure from *Classic* and *Screws* fits better that with which the enacting Congress was concerned than does the position the Court adopted 20 years ago. There are apparent incongruities in the view of the dissent which may be more easily reconciled in terms of the earlier holding in *Classic*.

The dissent considers that the "under color of" provision of § 1983 distinguishes between unconstitutional actions taken without state authority, which only the State should remedy, and unconstitutional actions authorized by the State, which the Federal Act was to reach. If so, then the controlling difference for the enacting legislature must have been either that the state remedy was more adequate for unauthorized actions than for authorized ones or that there was, in some sense, greater harm from unconstitutional actions authorized by the full panoply of state power and approval than from unconstitutional actions not so authorized or acquiesced in by the State. I find less than compelling the evidence that either distinction was important to that Congress.

I.

If the state remedy was considered adequate when the official's unconstitutional act was unauthorized, why should it not be thought equally adequate when the unconstitutional act was authorized? For it one thing is very clear in the legislative history, it is that the Congress of 1871 was well aware that no action requiring state judicial enforcement could be taken in violation of the Fourteenth Amendment without that enforcement being declared void by this Court on direct review from the state courts. And presumably it must also have been understood that there would be Supreme Court review of

the denial of a state damage remedy against an official on grounds of state authorization of the unconstitutional action. If therefore seems to me that the same state remedies would, with ultimate aid of Supreme Court review, furnish identical relief in the two situations. This is the point Senator Blair made when, having stated that the object of the Fourteenth Amendment was to prevent any discrimination by the law of any State, he argued that:

> "This being forbidden by the Constitution of the United States, and all the judges, State and national, being sworn to support the Constitution of the United States, and the Supreme Court of the United States having power to supervise and correct the action of the State courts when they violated the Constitution of the United States, there could be no danger of the violation of the right of citizens under color of the laws of the States." Cong. Globe, 42d Cong., 1st Sess., at App. 231.

Since the suggested narrow construction of § 1983 presupposes that state measures were adequate to remedy unauthorized deprivations of constitutional rights and since the identical state relief could be obtained for state-authorized acts with the aid of Supreme Court review, this narrow construction would reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action. Such a function could be justified on various grounds. It could, for example, be argued that the state courts would be less willing to find a constitutional violation in cases involving "authorized action" and that therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court

findings. But the legislative debates do not disclose congressional concern about the burdens of litigation placed upon the victims of "authorized" constitutional violations contrasted to the victims of unauthorized violations. Neither did Congress indicate an interest in relieving the burden placed on this Court in reviewing such cases.

The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter,[5] is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. For example, the tone is surely one of overflowing protection of constitutional rights, and there is not a hint of concern about the administrative burden on the Supreme Court, when Senator Frelinghuysen says:

> "As to the civil remedies, for a violation of these privileges, we know that when the courts of a State

[5] There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unathorized search and seizure as Monroe was allegedly subjected to may be only the norminal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the 14th Amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object." *Id.*, at 501.

And Senator Carpenter reflected a similar belief that the protection granted by the statute was to be very different from the relief available on review of state proceedings:

"The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise, between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.

"I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It gives Congress affirmative power to protect the rights

of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose." *Id.*, at 577.

In my view, these considerations put in serious doubt the conclusion that § 1983 was limited to state-authorized unconstitutional acts, on the premise that state remedies respecting them were considered less adequate than those available for unauthorized acts.

II.

I think this limited interpretation of § 1983 fares no better when viewed from the other possible premise for it, namely that state approved constitutional deprivations were considered more offensive than those not so approved. For one thing, the enacting Congress was not unaware of the fact that there was a substantial overlap between the protections granted by state constitutional provisions and those granted by the Fourteenth Amendment. Indeed one opponent of the bill, Senator Trumbull, went so far as to state in a debate with Senators Carpenter and Edmunds that his research indicated a complete overlap in every State, at least as to the protections of the Due Process Clause.[6] Thus in one very significant sense, there was no ultimate state approval of a large portion of otherwise authorized actions depriving a person of due-process rights. I hesitate to assume that the proponents of the present statute, who regarded it as necessary even though they knew that the provisions of the Fourteenth Amendment were self-executing, would have thought the remedies unnecessary whenever there were self-executing provisions of state constitutions also forbidding what the Fourteenth Amendment forbids. The only alternative is to disregard the possibility that a state court would find

[6] *Id.*, at 577.

the action unauthorized on grounds of the state constitution. But if the defendant official is denied the right to defend in the federal court upon the ground that a state court would find his action unauthorized in the light of the state constitution, it is difficult to contend that it is the added harmfulness of state approval that justifies a different remedy for authorized than for unauthorized actions of state officers. Moreover, if indeed the legislature meant to distinguish between authorized and unauthorized acts and yet did not mean the statute to be inapplicable whenever there was a state constitutional provision which, reasonably interpreted, gave protection similar to that of a provision of the Fourteenth Amendment, would there not have been some explanation of this exception to the general rule? The fact that there is none in the legislative history at least makes more difficult a contention that these legislators were in fact making a distinction between use and misuse of state power.

There is a further basis for doubt that it was the additional force of state approval which justified a distinction between authorized and unauthorized actions. No one suggests that there is a difference in the showing the plaintiff must make to assert a claim under § 1983 depending upon whether he is asserting a denial of rights secured by the Equal Protection Clause or a denial of rights secured by the Due Process Clauses of the Fourteenth Amendment. If the same Congress which passed what is now § 1983 also provided remedies against two or more nonofficials who conspire to prevent an official from granting equal protection of the laws, see 42 U. S. C. § 1985, then it would seem almost untenable to insist that this Congress would have hesitated, on the grounds of lack of full state approval of the official's act, to provide similar remedies against an official who, unauthorized, denied that equal protection of the laws on his own initiative. For there would be no likely state approval of or even acqui-

escence in a conspiracy to coerce a state official to deny equal protection. Indeed it is difficult to attribute to a Congress which forbad two private citizens from hindering an official's giving of equal potection an intent to leave that official free to deny equal protection of his own accord.[7]

We have not passed upon the question whether 42 U. S. C. § 1985,[8] which was passed as the second section of the Act that included § 1983, was intended to reach only the Klu Klux Klan or other substantially organized group activity, as distinguished from what its words seem to include, any conspiracy of two persons with "the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws. . . ."[9] Without now deciding the question, I think

[7] Compare the statement of Representative Burchard:

"If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable." Cong. Globe, 42d Cong., 1st Sess., App. 315.

[8] Section 2 as finally adopted was substantially as now provided in 42 U. S. C. § 1985: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[9] I do not think that this Court's decision in *Collins* v. *Hardyman*, 341 U. S. 651, can properly be viewed as determining the scope of the provision of § 1985 which refers to conspiring "for the purpose of

it is sufficient to note that the legislative history is not without indications that what the words of the statute seem to state was in fact the meaning assumed by Congress.[10]

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preventing . . . the constituted authorities of any State . . . from giving . . . the equal protection of the laws. . . ." Not only did the Court specifically disclaim any consideration of this provision, but it proceeded to emphasize that the petitioners therein had only been subjected to a private discrimination since, "There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it." 341 U. S., at 661. The holding that the equal protection of the law is unaffected by discriminatorily motivated violations of state law so long as the instrumentalities of law enforcement remain free, able, and willing to remedy these violations is clearly based upon premises which cannot control the quite dissimilar case of a conspiratorial attempt to affect the fairness of these instrumentalities, "the constituted authorities of any state."

[10] Representative Poland, who had doubted the constitutionality of the earlier forms of § 2, had no such doubts about its present form. His reading of the provision is clear from his defense of it.

"But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States." *Id.*, at 514.

An opponent of the provision was, if anything, even clearer in expressing his understanding of the coverage of the provision.

". . . It does not require that the combination shall be one that the State cannot put down; it does not require that it shall amount to

These difficulties in explaining the basis of a distinction between authorized and unauthorized deprivations of constitutional rights fortify my view that the legislative history does not bear the burden which *stare decisis* casts upon it. For this reason and for those stated in the opinion of the Court, I agree that we should not now depart from the holdings of the *Classic* and *Screws* cases.

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anything like insurrection. If three persons combine for the purpose of preventing or hindering the constituted authorities of any State from extending to all persons the equal protection of the laws, although those persons may be taken by the first sheriff who can catch them or the first constable, although every citizen in the country may be ready to aid as a *posse*, yet this statute applied. It is no case of domestic violence, no case of insurrection, and no case, therefore, for the interference of the Federal Government, much less its interference where there is no call made upon it by the Governor or the Legislature of the State." *Id.*, at App. 218 (Senator Thurman); see also *id.*, at 514 (Rep. Farnsworth).

SUPREME COURT OF THE UNITED STATES

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James Monroe, et al., Petitioners, v. Frank Pape et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 20, 1961.]

Mr. Justice Frankfurter, dissenting except insofar as the Court holds that this action cannot be maintained against the City of Chicago.

Abstractly stated, this case concerns a matter of statutory construction. So stated, the problem before the Court is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system. Again abstractly stated this matter of statutory construction is one upon which the Court has already passed. But it has done so under circumstances and in settings that negative those considerations of social policy upon which the doctrine of *stare decisis*, calling for the controlling application of prior statutory construction, rests.

This case presents the question of the sufficiency of petitioners' complaint in a civil action for damages brought under the Civil Rights Act, R. S. § 1979, 42 U. S. C. § 1983.[1] The complaint alleges that on October 29, 1958, at 5:45 a. m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gun-

[1] The complaint is in nine counts, and seeks to assert a claim in favor of Mr. Monroe, Mrs. Monroe, and their children, respectively, under each of R. S. §§ 1979, 1980 and 1981, 42 U. S. C. §§ 1983, 1985 and 1986. Petitioners have abandoned in this Court their claims under §§ 1980 and 1981, and we are not now asked to determine the applicability of those sections to the facts alleged.

point to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder[2] and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him. It is also alleged that the actions of the officers throughout were without authority of a search warrant or an arrest warrant; that those actions constituted arbitrary and unreasonable conduct; that the officers were employees of the City of Chicago, which furnished each of them with a badge and an identification card designating him as a member of the Police Department; that the officers were agents of the city, acting in the course of their employment and engaged in the performance of their duties; and that it is the custom of the Department to arrest and confine individuals for prolonged periods on "open" charges for interrogation, with the purpose of inducing incriminating statements, exhibiting its prisoners for identification, holding them *incommunicado* while police officers investigate their activities.

[2] The murder was asserted by the examining officers to have been committed two days before, on October 27.

sand punishing them by imprisonment without judicial trial. On the basis of these allegations various members of the Monroe family seek damages against the individual police officers and against the City of Chicago. The District Court dismissed the complaint for failure to state a claim and the Court of Appeals of the Seventh Circuit affirmed. 272 F. 2d 365.

Petitioners base their claim to relief in the federal courts on what was enacted as § 1 of the "Ku Klux Act" of April 20, 1871, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. It became, with insignificant rephrasing, § 1979 of the Revised Statutes. As now set forth in 42 U. S. C. § 1983, it is, in relevant part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

I.

In invoking § 1979 (the old designation will be used hereafter), petitioners contend that its protection of "rights, privileges, or immunities secured by the Constitution" encompasses what "due process of law" and "the equal protection of the laws" of the Fourteenth Amendment guarantee against action by the States. In this contention they are supported both by the title of the Act of 1871 and by its legislative history. See the authoritative statement of Mr. Edmunds, reporting the bill from the Senate Committee on the Judiciary, Cong. Globe, 42d Cong., 1st Sess. 568. *See also id.*, at 332–334, App. 83–85.

310. It is true that a related phrase, "any right or privilege secured . . . by the Constitution or laws," in § 241 of Title 18, U. S. C., was said by a plurality of the Court in *United States* v. *Williams*, 341 U. S. 70, to comprehend only the rights arising immediately from the relationship of the individual to the central government. And see *United States* v. *Cruikshank*, 92 U. S. 542. But this construction was demanded by § 241, which penalizes conspiracies of private individuals acting as such, while § 1979 applies only to action taken "under color of any statute," etc. Different problems of statutory meaning are presented by two enactments deriving from different constitutional sources. See the *Civil Rights Cases*, 109 U. S. 3. Compare *United States* v. *Williams*, *supra*, with *Screws* v. *United States*, 325 U. S. 91. If petitioners have alleged facts constituting a deprivation under color of state authority of a right assured them by the Fourteenth Amendment, they have brought themselves within § 1979. *Douglas* v. *Jeannette*, 319 U. S. 157; *Hague* v. *C. I. O.*, 307 U. S. 496, 525–526.[4]

To be sure, *Screws* v. *United States*, *supra*, requires a finding of specific intent in order to sustain a conviction

[3] Drawing upon the reasoning of the *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36, this decision determined that only those rights or privileges were secured by the Constitution and laws which were inherent in the status of the individual as a citizen of the National Government; see *Ex parte Yarbrough*, 110 U. S. 651, *Guinn* v. *United States*, 238 U. S. 347, or which were necessary to the integrity of the federal governmental institution, see *Motes* v. *United States*, 178 U. S. 458; compare *Logan* v. *United States*, 144 U. S. 263, with *United States* v. *Powell*, 212 U. S. 564, or which were created by Congress in the legitimate exercise of its Article I powers; see *United States* v. *Waddell*, 112 U. S. 76.

[4] It was brought to the attention of Congress in 1871 that "rights, privileges, or immunities" was a more extensive phrase than "privileges or immunities" as used in the Fourteenth Amendment prohibiting a State from abridging "the privileges or immunities of citizens of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 49–50.

under the cognate penal provisions of 18 U. S. C. § 242 [4] — "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U. S., at 104. Petitioners' complaint here alleges no such specific intent. But, for a number of reasons, this requirement of *Screws* should not be carried over and applied to civil actions under § 1979. First, the word "willfully" in 18 U. S. C. § 242 from which the requirement of intent was derived in *Screws* does not appear in § 1979. Second, § 1979, by the very fact that it is a civil provision, invites treatment different from that to be given its criminal analogue. The constitutional scruples concerning vagueness which were deemed to compel the *Screws* construction have less force in the context of a civil proceeding, and § 1979, insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts. Third, even in the criminal area, the specific intent demanded by *Screws* has proved to be an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries. The *Screws* opinion itself said that "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Consti-

[4] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[5] Civil liability has always been drawn from such indefinite standards as reasonable care, a man of ordinary prudence, foreseeability, etc. And see *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521; *Miller v. Strahl*, 239 U. S. 426.

tution." 325 U. S., at 106. And lower courts in applying the statute have allowed inference of the requisite specific intent from evidence, it would appear, of malevolence alone.[5] But if intent to infringe "specific" constitutional rights comes in practice to mean no more than intent without justification to bring about the circumstances which infringe those rights, then the consequence of introducing the specific intent issue into a litigation is, in effect, to require fictional pleading, needlessly burden jurors with abstruse instructions, and lessen the degree of control which federal courts have over jury vagaries.

If the courts are to enforce § 1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

II.

To show such violations, petitioners invoke primarily the Amendment's Due Process Clause.[6] The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are "implicit in the concept of ordered liberty," are imposed by the Due Process Clause upon the States. *Palko* v. *Connecticut*, 302 U. S. 319, 325. When we apply to their complaint that standard of a "prin-

[5] See *Koehler* v. *United States*, 189 F. 2d 711 (C. A. 5th Cir.); *Clark* v. *United States*, 193 F. 2d 294 (C. A. 5th Cir.); *Crews* v. *United States*, 160 F. 2d 746 (C. A. 5th Cir.). These cases are not cited by way of approval.

[6] Petitioners also rely on the Equal Protection Clause. The disposition of the litigation by the majority here makes it unnecessary to discuss this aspect of the case.

ciple of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," [9] which has been the touchstone for this Court's enforcement of due process,[10] the merit of this constitutional claim is evident. The conception expressed in *Wolf* v. *Colorado*, 338 U. S. 25, 27, that "The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society," was not an innovation of *Wolf*. The tenet that there exists a realm of sanctuary surrounding every individual and infrangible, save in a very limited class of circumstances, by the agents of government, had informed the decision of the King's Bench two centuries earlier in *Entick* v. *Carrington*, 2 Wils. 275, had been the basis of Otis' cotemporary speech against the Writ of Assistance, see Gray's notes in Quincy's Massachusetts Reports, App. I, at 471, Tudor, Life of James Otis (1823) 63, and has in the intervening years found expression not only in the Fourth Amendment to the Constitution of the United States, but in the fundamental law of every State.[11] Modern totalitarianisms have been a stark

[9] *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

[10] *See Twining* v. *New Jersey*, 211 U. S. 78; *Powell* v. *Alabama*, 287 U. S. 45; *Palko* v. *Connecticut*, 302 U. S. 319; *Betts* v. *Brady*, 316 U. S. 455; *Gibbs* v. *Burke*, 337 U. S. 773; *Rochin* v. *California*, 342 U. S. 165.

[11] Ala. Const., Art. I, § 5; Alaska Const., Art. I, § 14; Ariz. Const., Art. II, § 8; Ark. Const., Art. II, § 15; Cal. Const., Art. I, § 19; Colo. Const., Art. II, § 7; Conn. Const., Art. I, § 8; Del. Const., Art. I, § 6; Fla. Const., Declaration of Rights, § 22; Ga. Const., Art. I, § 2-116; Hawaii Const., Art. I, § 5; Idaho Const., Art. I, § 17; Ill. Const., Art. II, § 6; Ind. Const., Art. I, § 11; Iowa Const., Art. I, § 8; Kan. Const., Bill of Rights, § 15; Ky. Const., Bill of Rights, § 10; La. Const., Art. 1, § 7; Me. Const., Art. I, § 5; Md. Const., Declaration of Rights, Art. 26; Mass. Const., Pt. I, Art. XIV; Mich. Const., Art. II, § 10; Minn. Const., Art. I, § 10; Miss. Const., Art. 3, § 23; Mo. Const., Art. I, § 15; Mont. Const., Art. III, § 7; Neb. Const., Art. I, § 7; Nev. Const., Art. I, § 18; N. H. Const., Pt. I, Art. 19; N. J. Const., Art. I, par. 7; N. M. Const., Art. II,

reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man.

The essence of the liberty protected by the common law and by the American constitutions was "the right to shut the door on officials of the state unless their entry is under proper authority of law"; particularly, "the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual." *Frank* v. *Maryland*, 359 U. S. 360, 365.[12] Searches of the dwelling house were the special object of this universal condemnation of official intrusion.[13] Night-time search was the evil in its most obnoxious form.[14] Few reported cases have presented all of the manifold aggravating circumstances which petitioners here allege—intrusion *en masse*, by dark, by force,

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§ 10; N. Y. Civil Rights Law, § 8; N. C. Const., Art. I, § 15; N. D. Const., Art. I, § 18; Ohio Const., Art. I, § 14; Okla. Const., Art. II, § 30; Ore. Const., Art. I, § 9; Pa. Const., Art. I, § 8; R. I. Const., Art. I, § 6; S. C. Const., Art. I, § 16; S. D. Const., Art. VI, § 11; Tenn. Const., Art. I, § 7; Tex. Const., Art. I, § 9; Utah Const., Art. I, § 14; Vt. Const., C. I, Art. 11; Va. Const., Art. I, § 10; Wash. Const., Art. I, § 7; W. Va. Const., Art. III, § 6; Wis. Const., Art. I, § 11; Wyo. Const., Art. I, § 4.

[12] See *Huckle* v. *Money*, 2 Wils. 205; *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Bessemer* v. *Eidge*, 162 Ala. 201, 50 So. 270; 1 Cooley's Constitutional Limitations (8th ed. 1927) 610–615; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921), containing a collection of authorities.

[13] See *e. g.*, *Thurman* v. *State*, 116 Fla. 426, 156 So. 484; compare *Simpson* v. *State*, 215 S. W. 2d 617 (Tex. Cr. App.), with *McClannan* v. *Chaplain*, 136 Va. 1, 15–17, 116 S. E. 495. Note the common legislative proscription upon the search of private homes by officers otherwise authorized to make entries for the enforcement of prohibition laws and other regulatory statutes. *E. g.*, National Prohibition Act, tit. II, § 25, 41 Stat. 305, 315; and see Cornelius, Search and Seizure (2d ed. 1930), §§ 135–144.

[14] See 2 Hale, Pleas of the Crown (Wilson ed. 1800) 150;

unauthorized by warrant, into an occupied private home, without even the asserted justification of belief by the intruders that the inhabitants were presently committing some criminal act within; physical abuse and the calculated degradation of insult and forced nakedness; sacking and disordering of personal effects throughout the home; arrest and detention against the background terror of threatened criminal proceedings. Wherever similar conduct has appeared, the courts have unanimously condemned police entries as lawless.[15]

If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick. If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in the *Wolf* opinion was addressed: "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." 338 U. S., at 28. If that issue is not reached in this case it is not because the conduct which the record here presents can be condoned. But by bringing their action in a Federal District Court petitioners cannot rest on the Fourteenth Amendment *simpliciter*. They invoke the protection of a specific statute by which Congress restricted federal judicial enforcement of its guarantees to

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[15] See, *e. g.*, *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955); *Sarafini* v. *San Francisco*, 143 Cal. App. 2d 570, 300 P. 2d 44 (1956); *Ware* v. *Dunn*, 80 Cal. App. 2d 936, 183 P. 2d 128 (1947); *Walker* v. *Whittle*, 83 Ga. App. 445, 64 S. E. 2d 87 (1951); *People* v. *Dalpe*, 371 Ill. 607, 21 N. E. 2d 756 (1939); *Hart* v. *State*, 195 Ind. 384, 145 N. E. 492 (1924); *Johnson* v. *Commonwealth*, 296 S. W. 2d 210 (Ky. App. 1956); *Deaderick* v. *Smith*, 33 Tenn. App. 151, 230 S. W. 2d 406 (1950).

particular enumerated circumstances. They must show not only that their constitutional rights have been infringed, but that they have been infringed "under color of [state] statute, ordinance, regulation, custom, or usage," as that phrase is used in the relevant congressional enactment.

III.

Of course, if Congress by appropriate statutory language attempted to reach every act which could be attributed to the States under the Fourteenth Amendment's prohibition: "No State shall . . . .", the reach of the statute would be the reach of the Amendment itself. Relevant to the enforcement of such a statute would be not only the concept of state action as this Court has developed it, see *Nixon* v. *Condon*, 286 U. S. 73, 89, but also considerations of the power of Congress, under the Amendment's Enforcement Clause, to determine what is "appropriate legislation" to protect the rights which the Fourteenth Amendment secures. Cf. *United States* v. *Raines*, 362 U. S. 17. Still, in this supposed case we would arrive at the question of what Congress could do only after we had determined what it was that Congress had done. So, in the case before us now we must ask what Congress did in 1871. We must determine what Congress meant by "under color" of enumerated state authority.[16]

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[16] The various analyses which have enabled this Court to find state action in situations other than that presented by *Barney* v. *New York*, 193 U. S. 430, are plainly not appropriate to consideration of the question whether in a given instance official conduct is "under color" of state law. *Nashville, C. & St. L. Ry* v. *Browning*, 310 U. S. 362, and *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U. S. 239, came here on certiorari from state court proceedings. *Coulter* v. *Louisville & Nashville R. Co.*, 196 U. S. 599, and *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, held that accepted administrative usage in the exercise of a power specifically conferred by state legislation and

Congress used that phrase not only in R. S. § 1979, but also in the criminal provisions of § 2 of the First Civil Rights Act of April 9, 1866, 14 Stat. 27, from which is derived the present 18 U. S. C. § 242,[17] and in both cases used it with the same purpose.[18] During the seventy years

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wholly dependent upon that legislation for its coercive effects might constitute such action of a State as to present a cognizable federal question. But see *Memphis* v. *Cumberland Tel. & Tel. Co.*, 218 U. S. 624. Similarly, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, held that the existence in a state constitution of provisions coincident with those of the Federal Constitution did not *ipso facto* immunize state officials from the original jurisdiction of the federal courts. From none of these cases is implication to be drawn pertinent to the interpretation of § 1979.

[17] See note 5, *supra*.

[18] Mr. Shellabarger, Chairman of the House Select Committee which authored the Act of April 20, 1871, whose first section is now § 1979, reported to the House that that section was modeled upon the second section of the Act of April 9, 1866, 14 Stat. 27 and that the two sections were intended to cover the same cases, with qualifications not relevant here. Cong. Globe, 42d Cong., 1st Sess., App. 68. See also *id.*, at 461. The 1866 provision had been re-enacted, substantially and in form, by the seventeenth and eighteenth sections of the Act of May 31, 1870, 16 Stat. 140, 144, and the 1874 revision of the provision was in turn patterned on the present § 1979. See *Screws* v. *United States*, 325 U. S. 91, 99–100. The sections have consistently been read as coextensive in their reach of acts "under color" of state authority. *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, 248 (C. A. 3d Cir.); *Burt* v. *City of New York*, 156 F. 2d 791, 792 (C. A. 2d Cir.); *McShane* v. *Moldovan*, 172 F. 2d 1016, 1020 (C. A. 6th Cir.); *Geach* v. *Moynahan*, 207 F. 2d 714, 717 (C. A. 7th Cir.).

As enacted in 1871, the provision which is now § 1979 reached acts taken "under color of any *law*, statute, ordinance, regulation, custom, or usage of any State . . . ." 17 Stat. 13. (Emphasis added.) In the Revised Statutes of 1874 and 1878 "law" was omitted from the section, although "law" was retained in the parallel criminal provision, R. S. § 5510, as amended, 18 U. S. C. § 242, and in the jurisdictional provisions, R. S. §§ 563 (12) and 629 (16). The deletion in § 1979 appears in the Revisers' Draft (1872) without expla-

which followed these enactments, cases in this Court in which the "under color" provisions were invoked uniformly involved action taken either in strict pursuance of some specific command of state law [19] or within the scope of executive discretion in the administration of state laws.[20] The same is true, with two exceptions, in the lower federal courts.[21] In the first of these two cases it was held that

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nation. 1 Revision of U. S. Statutes, Drafts (1872) 947. No alteration in statutory coverage is permissibly to be based upon the change. The jurisdictional provisions may now be found in 28 U. S. C. § 1343.

[19] *Carter* v. *Greenhow*, 114 U. S. 317; *Lowman* v. *Chicago & N. W. Ry. Co.*, 115 U. S. 611; *Giles* v. *Harris*, 189 U. S. 475; *Devine* v. *Los Angeles*, 202 U. S. 313; *Myers* v. *Anderson*, 238 U. S. 368; *Nixon* v. *Herndon*, 273 U. S. 536; *Lane* v. *Wilson*, 307 U. S. 268; *Douglas* v. *Jeannette*, 319 U. S. 157. One case not involving a state constitution, statute, or ordinance was an instance of state *judicial* action. *Green* v. *Elbert*, 137 U. S. 615; and see *Anglo-American Prov. Co.* v. *Davis Prov. Co., No. 2*, 191 U. S. 376.

[20] *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *Moyer* v. *Peabody*, 212 U. S. 78; *Hague* v. *C. I. O.*, 307 U. S. 496; cf. *Smith* v. *Allwright*, 321 U. S. 649.

[21] *Northwestern Fertilizing Co.* v. *Hyde Park*, 18 Fed. Cas. 393, No. 10,336 (C. C. N. D. Ill. 1873); *Baltimore & Ohio R. Co.* v. *Allen*, 17 F. 171 (C. C. W. D. Va. 1883); *Tuchman* v. *Welch*, 42 F. 548, and *M. Schandler Bottling Co.* v. *Welch*, 42 F. 561 (C. C. D. Kan. 1890); *Hemsley* v. *Myers*, 45 F. 283 (C. C. D. Kan. 1891); *Davenport* v. *Cloverport*, 72 F. 689 (D. C. D. Ky. 1896); *Fraser* v. *McConway & Torley Co.*, 82 F. 257 (C. C. D. Ia. 1897); *Crystal Springs Land & Water Co.* v. *Los Angeles*, 76 F. 148 (C. C. S. D. Cal. 1896), aff'd, 177 U. S. 169 (see *California Oil & Gas Co.* v. *Miller*, 96 F. 12 (C. C. S. D. Cal. 1899)); *Aultman & Taylor Co.* v. *Bramfield*, 102 F. 7 (C. C. N. D. Ohio 1900), app. dism'd 22 S. Ct. 938; *Wadleigh* v. *Newhall*, 136 F. 941 (C. C. N. D. Cal. 1905); *Farson* v. *City of Chicago*, 138 F. 184 (C. C. N. D. Ill. 1905); *Brickhouse* v. *Brooks*, 165 F. 534 (C. C. E. D. Va. 1908); *Simpson* v. *Geary*, 204 F. 507 (D. C. D. Ariz. 1913); *Rauch* v. *Truax*, 219 F. 273 (D. C. D. Ariz. 1915), aff'd, 239 U. S. 33; *Marcus Brown Holding Co.* v. *Pallak*, 272 F. 137 (D. C. S. D. N. Y. 1920); *West* v. *Bliley*, 33 F. 2d 177 (D. C. E. D. Va. 1929), aff'd, 42 F. 2d 101 (C. A. 4th Cir. 1930);

§ 1979 was not directed to instances of lawless police brutality, although the ruling was not put on "under color" grounds.[22] In the second, an indictment charging a county tax collector with depriving one Ah Koo of a feder-

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Trudeau v. *Barnes*, 65 F. 2d 563 (C. A. 5th Cir. 1933); *Jones* v. *Oklahoma City*, 78 F. 2d 860 (C. A. 10th Cir. 1935); *Mitchell* v. *Greenough*, 100 F. 2d 184 (C. A. 9th Cir. 1938); *Blackman* v. *Stone*, 101 F. 2d 500 (C. A. 7th Cir. 1939); *City of Manchester* v. *Leiby*, 117 F. 2d 661 (C. A. 1st Cir. 1941); *Hannan* v. *City of Haverhill*, 120 F. 2d 87 (C. A. 1st Cir. 1941); *Hume* v. *Mahan*, 1 F. Supp. 142 (D. C. E. D. Ky. 1932), rev'd, 287 U. S. 575; *Premier-Pabst Sales Co.* v. *McNutt*, 17 F. Supp. 708 (D. C. S. D. Ind. 1935); *Gobitis* v. *Minersville School Dist.*, 21 F. Supp. 581 (D. C. E. D. Pa. 1937), 24 F. Supp. 271 (1938), aff'd, 108 F. 2d 683 (C. A. 3d Cir. 1939), rev'd, 310 U. S. 586; *Connor* v. *Rivers*, 25 F. Supp. 937 (D. C. N. D. Ga. 1938), aff'd, 305 U. S. 576; *Ghadiali* v. *Delaware State Medical Society*, 28 F. Supp. 841 (D. C. D. Del. 1939); *Mills* v. *Board of Education*, 30 F. Supp. 245 (D. C. D. Md. 1939); *Bluford* v. *Canada*, 32 F. Supp. 707 (D. C. W. D. Mo. 1940), app. dism'd, 119 F. 2d 779 (C. A. 8th Cir. 1941); *Kennedy* v. *City of Moscow*, 39 F. Supp. 26 (D. C. D. Idaho 1941). In these cases R. S. § 1979 or the parallel jurisdictional provisions were invoked. Note that in the *Jones* and *Farson* cases, *supra*, defendant's conduct was specifically authorized by local ordinance, although plaintiffs asserted the invalidity of those ordinances under state as well as under federal law. In both cases relief was denied on the ground that no state action was shown, within the rule of *Barney* v. *New York*, 193 U. S. 430. To this group of cases involving acts authorized by state law must be added *Miller* v. *Rivers*, 31 F. Supp. 540 (D. C. M. D. Ga. 1940), rev'd as moot, 112 F. 2d 439 (C. A. 5th Cir. 1940), in which a state governor had several times authorized action in violation of state court restraining orders, finally declaring martial law in the face of the state judicial decrees. Two reported criminal prosecutions under § 242 also involved conduct sanctioned by state law: *United States* v. *Buntin*, 10 F. 730 (C. C. S. D. Ohio 1882); *United States* v. *Stone*, 188 F. 836 (D. Md. 1911). Cf. *United States* v. *Horton*, 26 Fed. Cas. 375, No. 15,392 (D. Ala. 1867) (semble).

[22] *Brawner* v. *Irvin*, 169 F. 964 (C. C. N. D. Ga. 1909). In one case decided in 1940 just prior to *United States* v. *Classic*, 313 U. S. 299, a Federal District Court did distinctly decide that similar police

ally secured right under color of a designated California law, set forth in the indictment, was held insufficient against a demurrer. *United States* v. *Jackson*, 26 Fed. Cas. 563, No. 15,459 (C. C. D. Cal. 1874). The court wrote:

> "The indictment contains no averment that Ah Koo was a foreign miner, and within the provisions of the state law. If this averment be unnecessary . . . the act of congress would then be held to apply to a case of illegal extortion by a tax collector from any person, though such exaction might be wholly unauthorized by the law under which the officer pretended to act.
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> "We are satisfied that it was not the design of congress to prevent or to punish such abuse of authority by state officers. The object of the act was, not to prevent illegal exactions, but to forbid the execution of state laws, which, by the act itself, are made void. . . .
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> "It would seem, necessarily, to follow, that the person from whom the tax was exacted must have been a person from whom, under the provisions of the state law, the officer was authorized to exact it. The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions

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misconduct unauthorized by state law, was "under color" of state law. *United States* v. *Sutherland*, 37 F. Supp. 344 (D. C. N. D. Ga. 1940). An unreported 1940 case, *United States* v. *Cowan* (D. C. E. D. La.), is said to have reached a similar result. See 1941 Atty. Gen. Rep. 98; Brief for the United States, *United States* v. *Classic*, 313 U. S. 299, p. 45, n. 25. In neither of these two cases does there appear to have been any examination of the legislative history of the "under color" statutes, nor is any reasoning offered to support the conclusion of the courts.

of the state law, the exaction cannot be said to have been made 'under color of law,' any more than a similar exaction from a Chinese miner, made by a person wholly unauthorized, and under the pretense of being a tax collector." *Id.*, at 563–564.

Throughout this period, the only indication of this Court's views on the proper interpretation of the "under color" language is a dictum in the *Civil Rights Cases*, 109 U. S. 3. There, in striking down other Civil Rights Act provisions which, as the Court regarded them, attempted to reach private conduct not attributable to state authority, Mr. Justice Bradley contrasted those provisions with § 2 of the Act of 1866: "This [latter] law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." *Id.*, at 16.

A sharp change from this uniform application of seventy years was made in 1941, but without acknowledgment or indication of awareness of the revolutionary turn-about from what had been established practice. The opinion in *United States* v. *Classic*, 313 U. S. 299, accomplished this. The case presented an indictment under § 242 charging certain local Commissioners of Elections with altering ballots cast in a primary held to nominate candidates for Congress. Sustaining the sufficiency of the indictment in an exte... ...e opinion concerned principally with the question whether the right to vote in such a primary was a right secured by the Constitution.[7] Mr. Justice Stone wrote that the alteration of the ballots was "under color" of state law. This holding was summarily announced without exposition; it had been only passingly

[7] The court below had dismissed the indictment on the ground that the right was not so secured and had not discussed the "under color" issue. 35 F. Supp. 66.

argued.[24] Of the three authorities cited to support it, two did not involve the "under color" statutes,[25] and the third, *Hague* v. *C. I. O.*, 307 U. S. 496, was a case in which high-ranking municipal officials claimed authorization for their actions under municipal ordinances (here held unconstitutional) and under the general police powers of the State.[26] All three of these cases had dealt with "State action" problems, and it is "State action," not the very different question of the "under color" clause, that Mr. Justice Stone

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[24] The Government's brief contended that, inasmuch as the Civil Rights statutes were passed to enforce the Fourteenth Amendment, they should be read as coextensive with it: "under color" of state law should be coincident with "State action" as this Court had developed the "State action" concept. Classic's brief argued the point as though it were urging a "State action" contention.

[25] *Ex parte Virginia*, 100 U. S. 339, arose under federal legislation penalizing "any officer or other person charged with any duty in the selection or summoning of jurors" who discriminated on grounds of race, color, or previous condition of servitude in the choosing of juries. The issue was whether this provision could constitutionally be applied to a state judge who discriminated in the administration of a state statute fair on its face. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, posed the question whether the enforcement of an allegedly confiscatory municipal regulatory ordinance was state action for purposes of Federal District Court "arising under" jurisdiction.

[26] The Mayor and other officials of Jersey City were charged with a concerted program of discriminatory law enforcement intended to drive union organizers out of the city. The acts upon which amenability to suit under § 1979 was predicated were (1) the enforcement of a municipal ordinance which this Court held unconstitutional on its face; (2) the enforcement of a second ordinance in a manner which willfully discriminated against union organizers, and (3) "acts not under the authority of any ordinance or statute but committed under color of municipal office and as part of a deliberate municipal policy." 101 F. 2d 774, 790. The Court of Appeals for the Third Circuit held that on these facts, all three classes of conduct, viewed together, constituted "State action." This Court affirmed and modified the decree without considering the point.

appears to have considered.[27] (I joined in this opinion without having made an independent examination of the legislative history of the relevant legislation or of the authorities drawn upon for the *Classic* construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study.) When, however, four years later the Court was called on to review the conviction under § 242 of a Georgia County Sheriff who had beaten a Negro prisoner to death, the opinion of four of the six Justices who believed that the statute applied merely invoked *Classic* and *stare decisis* and did not reconsider the meaning which that case had uncritically assumed was to be attached to the language, "under color" of state authority. *Screws* v. *United States*, 325 U. S. 91. The briefs in the *Screws* case did not examine critically the legislative history of the Civil Rights Acts.[28] The only reference to this history in the plurality opinion, insofar as it bears on the interpretation of the clause "under color of . . . law," is contained in a pair of sentences discounting two statements by Senators Trumbull and Sherman regarding the Civil Rights Acts of

[27] That the Court had not in the *Classic* case isolated the "under color" issue from the question of "State action" is indicated by the opinions in *Snowden* v. *Hughes*, 321 U. S. 1. The latter case arose under § 1979, yet although the "State action" principle had been the basis for the decision below and was prominently treated in two opinions here, no reference was made to the "under color" phrase.

[28] The brief for petitioners Screws et al. contains no citation to legislative history. The brief for the United States, after several citations intended to demonstrate that the purpose of the Civil Rights Acts was to enforce the Fourteenth Amendment and to protect the rights which it secures (these citations, employed to the same purpose, may be found in the plurality opinion, 325 U. S., at 98–99), sets forth only one other bit of legislative material, a statement made in debate by Senator Davis of Kentucky, an opponent of the Act of 1866, to the effect that the Act would repeal the penal laws of all the States. See Cong. Globe, 39th Cong., 1st Sess. 598.

1866 and 1870, cited by the minority.[29] The bulk of the plurality opinion's treatment of the issue consists of the argument that "under color" had been construed in *Classic* and that the construction there put on the words should not be abandoned or revised. 325 U. S., at 109–113. The case of *Williams* v. *United States*, 341 U. S. 97, reaffirmed *Screws* and applied it to circumstances of third degree brutality practiced by a private detective who held a special police officers' card and was accompanied by a regular policeman.[30]

Thus, although this Court has three times found that conduct of state officials which is forbidden by state law may be "under color" of state law for purposes of the Civil Rights Acts, it is accurate to say that that question has never received here the consideration which its impor-

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[29] See 325 U. S., at 111 (plurality); *id.*, at 142–144 (dissent). These two statements are set forth in text at notes 38 and 39, *infra*. The plurality opinion also contains references to other aspects of the legislative history in another context, *id.*, at 98–100; see note 28, *supra*. In his separate opinion, Mr. Justice Rutledge twice adverts to legislative materials; once with regard to matters not relevant here, *id.*, at 120, nn. 13, 14, and once, pertinently, with particular reference to the position of opponents of the 1866 Act that the legislation would invade the province of the States (setting forth Senator Davis' statement, see note 28, *supra*), *id.*, at 132, n. 33. Mr. Justice Murphy, also writing separately, does not discuss the "under color" issue.

[30] Neither the Court's opinion nor the briefs in *Williams* contain any citation to the legislative history of the Civil Rights Acts. It is true that between *Screws* and *Williams* Congress in 1948 re-enacted § 242 without material change. If that section were before the Court in the present case, the implications of that re-enactment might have to be appraised. Yet whatever tenuous thread of legislative approbation of *Screws* might be drawn from the kind of bulk-sale congressional action which was involved in its enactment of a whole criminal code by way of the new Title 18, U. S. C., in 1948, any attempt to tangle in that same thread § 1979—a statute which has not been touched by Congress in three quarters of a century—would exceed the bounds of fictionally implied legislative adoption.

tance merits. That regard for controlling legislative history which is conventionally observed by this Court in determining the true meaning of important legislation that does not construe itself [31] has never been applied to the "under color" provisions; particularly there has never been canvassed the full record of the debates preceding passage of the 1871 Act with which we are concerned in this case. Neither *Classic* nor *Screws* nor *Williams* warrant refusal now to take account of those debates and the illumination they afford. While we may well decline to re-examine recent cases which derive from the judicial process exercised under its adequate safeguards—documenting briefs and adequate arguments on both sides as foundation for due deliberation—the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration. Particularly is this so when that interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Acts for three quarters of a century.

"The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible." *Hertz* v. *Woodman*, 218 U. S. 205, 212. It is true, of course, that the reason for the rule is more compelling in cases involving inferior law, law capable of change by Congress, than in constitutional cases, where this Court—although even in such cases a wise consciousness of the limitations of individual vision has impelled it always

[31] *E. g., United States* v. *United Mine Workers*, 330 U. S. 258; *United States* v. *C. I. O.*, 335 U. S. 106; *United States* v. *Harriss*, 347 U. S. 612; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672; *Galvan* v. *Press*, 347 U. S. 522; *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448.

to give great weight to prior decisions—nevertheless bears the ultimate obligation for the development of the law as institutions develop. See, *e. g.*, *Smith* v. *Allwright*, 321 U. S. 649. But the Court has not always declined to re-examine cases whose outcome Congress might have changed. See Mr. Justice Brandeis, dissenting, in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407, n. 1. Decisions involving statutory construction, even decisions which Congress has persuasively declined to overrule, have been overruled here. See *Girouard* v. *United States*, 328 U. S. 61, overruling *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; and *United States* v. *Bland*, 283 U. S. 636; see also *Commissioner* v. *Estate of Church*, 335 U. S. 632, overruling *May* v. *Heiner*, 281 U. S. 238.

And with regard to the Civil Rights Acts there are reasons of particular urgency which authorize the Court—indeed, which make it the Court's responsibility—to reappraise in the hitherto skimpily considered context of R. S. § 1979 what was decided in *Classic*, *Screws* and *Williams*. This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision. Compare *National Bank* v. *Whitney*, 103 U. S. 99; *Vail* v. *Arizona*, 207 U. S. 201; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17; *United States* v. *South Buffalo Ry. Co.*, 333 U. S. 771. Nor is it merely a mine-run statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law-administration. In this aspect, it has significance approximating constitutional dimension. Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to

exercise its power within the fair limits of its judicial discretion. "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable. . . ." *Helvering* v. *Hallock*, 309 U. S. 106, 119.

Now, while invoking the prior decisions which have given "under color of [law]" a content that ignores the meaning fairly comported by the words of the text and confirmed by the legislative history, the Court undertakes a fresh examination of that legislative history. The decision in this case, therefore, does not rest on *stare decisis*, and the true construction of the statute may be thought to be as free from the restraints of that doctrine as though the matter were before us for the first time. Certainly, none of the implications which the Court seeks to draw from silences in the minority reports of congressional committees in 1956, 1957, and 1960, or from the use of "under color" language in the very different context of the Act of May 6, 1960, 74 Stat. 86—concerned, in relevant part, with the preservation of election records and with the implementation of the franchise—serves as an impressive bar to re-examination of the true scope of R. S. § 1979 itself in its pertinent legislative setting.[32]

[32] The Act of September 9, 1957, 71 Stat. 634, 637, provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote" at any election held solely or in part for the purpose of selecting or electing candidates for designated federal offices. Such an enactment, of course, can in no conceivable manner be considered congressional "adoption" or approbation of this Court's constructions of the "under color" clause in *Classic*, *Screws* and *Williams*, for the sufficient reason (among others) that

IV.

This case squarely presents the question whether the intrusion of a city policeman for which that policeman can show no such authority at state law as could be successfully interposed in defense to a state-law action

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the statute employs the clause only to go beyond it—manifesting a purpose, through the expression "under color of law or otherwise," to reach all individual conduct of the class described, whether or not "under color" of law, and whatever "under color" of law may mean. See H. R. Rep. No. 291, 85th Cong., 1st Sess. 12. The provisions of H. R. 627, 84th Cong., 2d Sess., as reported from the House Committee on the Judiciary and made the subject of H. R. Rep. No. 2187, 84th Cong., 2d Sess., are similar. See especially *id.*, at 9–11.

The Civil Rights Act of 1960, 74 Stat. 86, 88–89, 90, does twice use the clause "under color of [law]," but in contexts wholly different from that of R. S. § 1979. Section 301 of the 1960 Act requires every "officer of election" to retain and preserve during a specified period all records and papers which come into his possession relating to acts requisite to voting at an election wherein candidates for designated federal offices are voted for. Section 306 (which comprises the only use of "under color" language in the House bill that was the subject of H. R. Rep. No. 956, 86th Cong., 1st Sess.) defines an "officer of election" as "any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting" in any election at which votes are cast for candidates for those designated federal offices. These provisions, like those of the 1957 Act, are of very limited scope, reaching only certain conduct affecting federal elections. Section 601 of the 1960 Act provides that in any proceeding instituted by the Attorney General for preventive relief against the deprivation, on account of race or color, of certain voting rights, see R. S. § 2004, as amended by the Act of September 9, 1957, 71 Stat. 634, 637, 42 U. S. C. § 1971, the court shall, on proper request, make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such a pattern or practice, any person of that race or color resident within the affected area is entitled, during a specified period, to an order declaring him qualified to vote, "upon proof that at any election or elections (1) he is quali-

against him, is nonetheless to be regarded as "under color" of state authority within the meaning of R. S. § 1979. Respondents, in breaking into the Monroe apartment, violated the laws of the State of Illinois.[33] Illinois law appears to offer a civil remedy for unlawful searches;[34] petitioners do not claim that none is available. Rather they assert that they have been deprived of due process of law and of equal protection of the laws under color of state law, although from all that appears the courts of Illinois are available to give them the fullest redress which the common law affords for the violence done them, nor does any "statute, ordinance, regulation, custom, or usage" of the State of Illinois bar that redress. Did the enactment by Congress of § 1 of the Ku Klux Act of 1871 encompass such a situation?

That section, it has been noted, was patterned on the similar criminal provision of § 2, Act of April 9, 1866,

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fied under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law." Whatever meaning "under color of law" may have as so employed, Congress' use of the phrase in this narrowly limited context—applying to a situation in which voting rights have been infringed on grounds of race or color pursuant to a pattern or practice—cannot reasonably be taken as indicative of congressional attitude toward one or another possible construction of "under color" in the sweeping context of R. S. § 1979.

All this is said quite apart from the consideration of how little weight may properly be given to inferences drawn from the *silence* of *minority* reports of congressional committees, especially committees sitting almost a century after the enactment of the legislation in question.

[33] *People* v. *Grod*, 385 Ill. 584, 53 N. E. 2d 591; *People* v. *Dalpe*, 371 Ill. 607, 21 N. E. 2d 756; *People* v. *Brocamp*, 307 Ill. 448, 138 N. E. 728. See Ill. Rev. Stat., c. 38, §§ 691-699 (1959); Ill. Const., Art. II, § 6.

[34] *See Bucher* v. *Krause*, 200 F. 2d 576 (C. A. 7th Cir.).

The earlier Act had as its primary object the effective nullification of the Black Codes, those statutes of the Southern legislatures which had so burdened and disqualified the Negro as to make his emancipation appear illusory.[33] The Act had been vetoed by President Johnson, whose veto message describes contemporary understanding of its second section; the section, he wrote,

> "seems to be designed to apply to some existing or future law of a State or Territory which may conflict with the provisions of the bill. . . . It provides for counteracting such forbidden legislation by imposing fine and imprisonment upon the legislators who may pass such conflicting laws, or upon the officers or agents who shall put or attempt to put them into execution. It means an official offense, not a common crime committed against law upon the persons or property of the black race. Such an act may deprive the black man of his property, but not of the right to hold property. It means a deprivation of the right itself, either by the State judiciary or the State Legislature."[34]

[33] See Cong. Globe, 39th Cong., 1st Sess. 474, 662, 1117–1118, 1123–1124, 1151, 1159–1160, 1758–1759. See 1 Fleming, Documentary History of Reconstruction (Reprint 1950) 273–311; 2 Commager, Documents of American History (6th ed. 1958) 2–7, for typical Black Code provisions. A more dispassionate appraisal of the Codes than was possible during the turbulence of Reconstruction is found in Randall, The Civil War and Reconstruction (1937) 724–730.

[34] Cong. Globe, 39th Cong., 1st Sess. 1680. See also *id.*, at 1266. Light is thrown upon this distinction between the deprivation of a right and its violation—deprivation being competent to the law-making and law-enforcing organs of a State—by comparison of the language of § 1979 establishing liability for the "deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 17 Stat. 13, with the provisions of the criminal conspiracy section of the 1870 Act, penalizing conspiracies to intimidate any person in order

And Senator Trumbull, then Chairman of the Senate Judiciary Committee,[9] in his remarks urging its passage over the veto, expressed the intendment of the second section as those who voted for it read it:

> "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection."[10]

Section 2 of the 1866 Act was re-enacted in substance in 1870 as part of "An Act to enforce the Right of Citizens . . . to vote in the several States . . . ." 16 Stat. 140, 144. The following colloquy on that occasion is particularly revealing:

> "Mr. SHERMAN. My colleague cannot deny that we can by appropriate legislation prevent any private person from shielding himself under a State regulation, and thus denying to a person the right to vote . . . .
>
> "Mr. CASSERLY. I should like to ask the Senator from Ohio how a State can be said to abridge the right of a colored man to vote when some irresponsible person in the streets is the actor in that wrong?

to . . . hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution." 16 Stat. 140, 141. Cf. *Civil Rights Cases*, 109 U. S. 3, 17–18.

[9] Senator Trumbull had introduced the bill. Cong. Globe, 39th Cong., 1st Sess. 129.

[10] Cong. Globe, 39th Cong., 1st Sess. 1758.

"Mr. SHERMAN. If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it.

"Mr. CASSERLY. Suppose the State law authorizes the colored man to vote; what then?

"Mr. SHERMAN. That is not the case with which we are dealing. . . . This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. . . . [T]he first and second sections of the bill . . . simply punish officers as well as persons for discrimination under color of State laws or constitutions; and it so provides all the way through." [39]

The original text of the present § 1979 contained words left out in the Revised Statutes, which clarified the objective to which the provision was addressed:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United

[39] Cong. Globe, 41st Cong., 2d Sess. 3662. Mr. Sherman's remarks were addressed not specifically to the section which paralleled the 1866 "under color" language, but to the whole of the pending Senate amendment, a substitute for the House bill. Compare *id.*, at 3561 with *id.*, at 3503. It was from the Senate amendment, containing an "under color" provision modeled on § 2 of the Act of 1866, that the 1870 Act, as finally enacted, immediately derived.

States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured. . . ." [40]

Representative Shellabarger, reporting the section, explained it to the House as "in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights." [41] Senator Edmunds steering the measure through the Senate, found constitutional sanction for it in the Fourteenth Amendment: explaining that state action may consist in executive nonfeasance as well as malfeasance, so that any offenses against a citizen in a State are susceptible of federal protection "unless the criminal who shall commit those offenses is punished and the person who suffers receives that redress which the principles and spirit of the laws entitle him to have." [42] And James A. Garfield supported the bill in the House as "so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." [43]

Indeed, the Ku Klux Act as a whole encountered in the course of its passage strenuous constitutional objections which focused precisely upon an assertedly unauthorized

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[40] 17 Stat. 13. (Emphasis added.)

[41] Cong. Globe, 42d Cong., 1st Sess., App. 68. Mr. Shellabarger was the Chairman of the House Select Committee which drafted the Ku Klux Act. In reporting it out of committee, he described its first section, now § 1979, as modeled on the second section of the First Civil Rights Act of 1866. *Ibid.* In debate on the 1866 Act Shellabarger had said that the earlier provision was meant "not to usurp the powers of the States to punish offenses generally, against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act." Cong. Globe, 39th Cong., 1st Sess. 1294.

[42] Cong. Globe, 42d Cong., 1st Sess. 697.

[43] *Id.*, at 808.

extension of federal judicial power into areas of exclusive state competence."[6] A special target was § 2 of the bill as reported to the House, providing criminal penalties.

> "if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, consti-

[6] The claim was several times repeated in debate that the bill operated to absorb "the entire jurisdiction of the States over their local and domestic affairs," *id.*, at 366, or that it would bring "private grievances to the Federal courts." *Id.*, at 395. With very few exceptions (*ibid.*, *id.*, at 361, 429, App. 91) these criticisms were not directed to the Act's first sections, now § 1979. See also *id.*, at 416; 510, 660, App. 160, 179, 241–243, 258. One opposition speaker did object specifically to § 1 as providing a federal forum for the deprivation of a suitor's rights although "The offenses committed against him may be the common violations of the municipal law of his State." *Id.*, at App. 50. And one supporter of the measure, who argued that the Fourteenth Amendment gave Congress power to enact a general criminal law, if necessary, for the protection of citizens under the Privileges and Immunities, Due Process, and Equal Protection Clauses, said of § 2 of the Act of 1866, the model for § 1 of the 1871 Act, that it punished acts which would otherwise be "mere misdemeanors" at state law. *Id.*, at 504. But these two remarks are the only assertions, throughout hundreds of pages of debate, that § 1 might reach conduct which state law proscribed. Proponents of the bill, addressing themselves to the charge of federal overreaching, insisted that they could support the measure only because they understood that it did not presume to enter upon that realm of protection of rights traditionally reserved to the States. *Id.*, at 800. See notes 47–50, *infra*. And see the statement of Senator Edmunds, *id.*, at 697–698: "[The bill] does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the hor which is due to the punishment of crime."

> tate the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process [*sic*] or resistance of officers in discharge of official duty, arson, or larceny. . . ."[55]

In vain the proponents of this section argued its propriety, seeking to support it by argument *ex necessitate* from the complete failure of state judicial and executive organs to control the depredations of the Klan.[56] Even

[55] *Id.*, at 317. Any act to effect the object of the conspiracy rendered all the conspirators guilty of a felony.

[56] The impetus for the enactment of the Ku Klux Act was President Grant's message to Congress asserting that a condition then existed in some State which rendered life and property insecure and which was beyond the power of state authorities to control. See *id.*, at App. 226. Throughout the debates on the bill the note was repeated that there was a need for federal action to supplant state administration which was failing to provide effective protection for private rights. *Id.*, at 343, 368, 374, 428, 444, 457–459, 460, 476, 505–506, 653, App. 78, 167, 185, 248–249, 252. Constitutional authority for such federal action was sought in the logic that "States" were ordered by the Fourteenth Amendment not to "deny" equal protection of the laws; that a "State" in effect denied such protection not only when its legislation was on its face unequal, but whenever its judicial or executive authorities by a consistent course of practice, "permanently and as a rule" refused to enforce its laws for the protection of some class of persons. *Id.* at 334. See *id.*, at 416, 482, 505–506, 606–608, 697, App. 251–252, 315. But what was deemed the prerequisite to validity of congressional action in implementation of the Amendment under this theory was no less than a State's permitting "the rights of citizens to be systematically trampled upon without color of law," *id.*, at 375; "A systematic failure to make arrests, to put on trial, to convict, or to punish offenders." *Id.*, at 459. The National Government was thought powerless to intervene to regulate "A mere assault and battery, or arson, or murder. . . . The law is believed to be sufficient to cover such cases, and the officers of justice amply able to arrest and punish the offenders." *Id.*, at 457. See also Mr. Perry's assertion, *id.*, at App. 79, that the wrongs which Congress may remedy "are not injuries inflicted by mere individuals

in the Reconstruction Congress, the majority party split. Many balked at legislation which they regarded as establishing a general federal jurisdiction for the protection of person and property in the States.[7] Only after a complete rewriting of the section to meet these constitutional objections could the bill be passed.[8] Yet almost none

or upon ordinary rights of individuals," but injuries inflicted "under color of State authority or by conspiracies and unlawful combinations with at least the tacit acquiescence of the State authorities." Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs.

[7] General Garfield, *id.*, at App. 154: "In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws, I give it my cheerful support; but when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority." (This objection is taken specifically to § 3 of the Act, authorizing federal executive intervention under certain circumstances.) See also, *e. g.*, *id.*, at App. 113–116: Mr. Farnsworth, who had no objection to § 1, now § 1979, vigorously opposed § 2 as extending to encompass individual action. Farnsworth regarded the Fourteenth Amendment as directed exclusively to the discriminations of state *legislation*, and his approval of § 1 indicates his understanding that it referred to conduct authorized by such legislation. Garfield seems to have agreed that § 1 did not reach even systematic maladministration of state law fair on its face. See *id.*, at App. 153.

[8] Mr. Shellabarger proposed the amendment to § 2, *id.*, at 477, to meet the constitutional objections which the original form of that section had evoked. See *id.*, at 478, App. 187–190, 313. Numerous members of the majority party thereupon withdrew their opposition to the bill. See *id.*, at 514, App. 187–190, 231, 313–315. The form of the second section as it was finally enacted is, in relevant part, substantially that of R. S. § 1980, 42 U. S. C. § 1985: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; [and] if one or more persons engaged therein do or cause to be done, any act in

of those who had decried § 2 as undertaking impermissibly to make the national courts tribunals of concurrent jurisdiction for the punishment of state-law offenses expressed similar objections to § 1, later § 1979.[49] One of the most vehement of those who could find no constitutional sanction for federal judicial control of conduct already pro-

furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." See 17 Stat. 13. Mr. Shellabarger emphasized that the purpose of the change was to make the gist of the offense a deprivation of *equality* of rights, not a deprivation of rights alone. Cong. Globe, 42d Cong., 1st Sess. 478.

[49] Representative Poland had argued the unconstitutionality of the original § 2 on the ground that it sought to extend federal *protection* to private person and property, whereas the Fourteenth Amendment guaranteed only *equal* protection, leaving the States free to protect or not to protect whatever interests they chose so long as the protection afforded was non-discriminatory. The amendment of § 2 met this objection, and Mr. Poland supported the bill, finding no cause for concern in the language of § 1. *Id.*, at 514. For other congressmen who opposed the initial form of § 2 but found no constitutional impediment to enactment of § 1, see *id.*, at 578–579 (Trumbull), App. 86 (Storm), 150–154 (Garfield), 187–190 (Willard). Farnsworth objected to even the amended form of § 2, but voiced no adverse criticism of § 1. *Id.*, at 513. Slater, also opposing § 2, argued that if Congress could assert general criminal jurisdiction in the States (as he contended that section did), it *could* also assert general civil jurisdiction in protection of person and property. Apparently he did not regard § 1 as threatening such an assertion. *Id.*, at App. 304.

There was in fact relatively little opposition to § 1. See *id.*, at 568. Many vociferous opponents of the Act did not assail that section. *E. g.*, *id.*, at 419, App. 112, 134–139, 300–303. What objections there were did not suggest that the section usurped state power by assuming a concurrent authority to redress state-law violations, but, quite the opposite, attacked the section for penalizing state judges, legislators and administrative officials acting in full obedience to state law, "under a solemn, official oath, though as pure in duty as a saint." *Id.*, at 365.

scribed by state law, and who therefore opposed original § 2 as reaching beyond the limits of congressional competence, expressly supported § 1 as affording "further redress for violations under State authority of constitutional rights." [50]

The general understanding of the legislators unquestionably was that, as amended, the Ku Klux Act did "not undertake to furnish redress for wrongs done by one person upon another in any of the States . . . in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery. . . ." [51] Even those who—opposing the constitutional objectors—found sufficient congressional power in the Enforcement Clause of the Fourteenth Amendment to give this kind of redress, deemed inexpedient the exercise of any such power: "Convenience and courtesy to the States suggest sparing use, and never so far as to supplant the State authority except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed upon them." [52] Extreme Radicals, those who believed that the remedy for the oppressed Unionists in the South was a general expansion of federal judicial jurisdiction so that "loyal men could have the privilege of having their causes, civil and criminal, tried in the Federal courts," were disappointed with the Act as passed.[53]

Finally, it is significant that the opponents of the Act, exhausting ingenuity to discover constitutional objections to every provision of it, also construed § 1 as addressed only to conduct authorized by state law, and therefore within the admitted permissible reach of Fourteenth Amendment federal power. "The first section of this bill

[50] *Id.*, at App. 315. See *id.*, at App. 313–315.
[51] *Id.*, at 579.
[52] *Id.*, at 368 (Sheldon). See also *id.*, at 501 (Frelinghuysen).
[53] *Id.*, at App. 277 (Porter).

prohibits any invidious legislation by States against the rights or privileges of citizens of the United States," one such opponent paraphrased the provision.[54] And Senator Thurman, who insisted vociferously on the absence of federal power to penalize a conspiracy of individuals to violate state law ("that is a case of mere individual violence, having no color whatsoever of authority of law, either Federal or State; and to say that you can punish men for that mere conspiracy, which is their individual act, and which is a crime against the State laws themselves, punishable by the State laws, is simply to wipe out all the State jurisdiction over crimes and transfer it bodily to the Congress"),[55] admitted without question the constitutionality of § 1.[56] ("It refers to a deprivation under color of law, either statute law or 'custom or usage' which has become common law").[57]

The Court now says, however, that "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'" Of course, if the notion of "unavailability" of remedy is limited to mean an absence of statutory, paper right, this

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[54] *Id.*, at App. 268 (Sloss).

[55] *Id.*, at App. 218.

[56] *Id.*, at App. 216.

[57] *Id.* at App. 217. One significant objection made to § 1 reveals its opponents' comprehension of its scope. It was objected that the section was unnecessary inasmuch as under Amendment Fourteen and the Supremacy Clause there was no longer any danger of "violation of the rights of citizens under color of the *laws* of the States." *Id.*, at App. 237 (Blair). The appellate jurisdiction of the Supreme Court of the United States under § 25 of the Judiciary Act of 178 , providing for review on writ of error of state court judgments sustaining state authority against federal constitutional challenge or striking down asserted federal authority, was regarded as offering sufficient protection against the deprivations of rights covered by § 1. *Id.* at App. 86 (Storm).

is in large part true.[58] Insofar as the Court undertakes to demonstrate—as the bulk of its opinion seems to do—that § 1979 was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States, the argument knocks at an open door. No one would, or could deny this, for by its express terms the statute comprehends deprivations of federal rights under color of any "statute, ordinance, regulation, *custom, or usage* of a State. (Emphasis added.) The question is, *what* class of cases other than those involving state statute law were meant to be reached. And, with respect to this question, the Court's conclusion is undermined by the very portions of the legislative debates which it cites. For surely the misconduct of individual municipal police officers, subject to the effective oversight of appropriate state administrative and judicial authorities, presents a situation which differs *toto coelo* from one in which "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress," [59] or in which murder rages while a State makes "no successful effort to bring the guilty to punishment or afford protection or redress," [60] or in which the "State courts . . . [are] unable to enforce the criminal laws . . . or to suppress the disorders existing," [61] or in which, in a State's "judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another," [62] or "of . . . hundreds of outrages . . . not one [is] punished," [63] or "the courts of the . . . States fail and refuse to do their

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[58] See note 46, *supra*.

[59] Cong. Globe, 42d Cong., 1st Sess. 374.

[60] *Id.*, at 428.

[61] *Id.*, at 653.

[62] *Id.*, at App. 315.

[63] *Id.*, at 505.

duty in the punishment of offenders against the law," [84] or in which a "class of officers charged under the laws with their administration permanently and as a rule refuse to extend [their] protection." [85] These statements indicate that Congress—made keenly aware by the post-bellum conditions in the South that States through their authorities could sanction offenses against the individual by settled practice which established state law as truly as written rules—designed § 1979 to reach, as well, official conduct which, because engaged in "permanently and as a rule," or "systematically," [86] came through acceptance by law-administering officers to constitute "custom, or usage" having the cast of law. See *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369. They do not indicate an attempt to reach, nor does the statute by its terms include, instances of acts in defiance of state law and which no settled state practice, no systematic pattern of official action or inaction, no "custom, or usage, of any State," insulates from effective and adequate reparation by the State's authorities.

Rather, all the evidence converges to the conclusion that Congress by § 1979 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts, because some "statute, ordinance, regulation, custom, or usage" sanctioned the grievance complained of. This purpose, manifested even by the so-called "Radical" Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which

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[84] *Id.*, at App. 179.

[85] *Id.*, at 334.

[86] See note 46, *supra*.

the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our Federalism.[8]

Its commands were addressed to the States. Only when the States, through their responsible organs for the formulation and administration of local policy, sought to deny or impede access by the individual to the central government in connection with those enumerated functions assigned to it, or to deprive the individual of a certain minimal fairness in the exercise of the coercive forces of the State, or without reasonable justification to treat him differently than other persons subject to their jurisdiction, was an overriding federal sanction imposed. As between individuals, no corpus of substantive rights was guaranteed by the Fourteenth Amendment, but only "due process of law" in the ascertainment and enforcement of rights and equality in the enjoyment of rights and safeguards that the States afford. This was the base of the distinction between federal citizenship and state citizenship drawn by the *Slaughter-House Cases*, 16 Wall. 36. This conception begot the "State action" principle on which, from the time of the *Civil Rights Cases*, 109 U. S. 3, this Court has relied in its application of Fourteenth Amendment guarantees. As between individuals, that body of mutual rights and duties which constitute the civil personality of a man remains essentially the creature of the legal institutions of the States.

But, of course, in the present case petitioners argue that the wrongs done them were committed not by individuals but by the police as state officials. There are two senses

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[8] "The Fourteenth Amendment, itself a historical product, did not destroy history for the States. . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31.

in which this might be true. It might be true if petitioners alleged that the redress which state courts offer them against the respondents is different than that which those courts would offer against other individuals, guilty of the same conduct, who were not the police. This is not alleged. It might also be true merely because the respondents *are* the police—because they are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals. Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government. For this reason the national legislature, exercising its power to implement the Fourteenth Amendment, might well attribute responsibility for the intrusion to the State and legislate to protect against such intrusion. The pretense of authority alone might seem to Congress sufficient basis for creating an exception to the ordinary rule that it is to the state tribunals that individuals within a State must look for redress against other individuals within that State. The same pretense of authority might suffice to sustain congressional legislation creating the exception. See *Ex parte Virginia*, 100 U. S. 339. But until Congress has declared its purpose to shift the ordinary distribution of judicial power for the determination of causes between co-citizens of a State, this Court should not make the shift. Congress has not in § 1979 manifested that intention.

The unwisdom of extending federal criminal jurisdiction into areas of conduct conventionally punished by state penal law is perhaps more obvious than that of extending federal civil jurisdiction into the traditional realm of state tort law. But the latter, too, presents its

problems of policy appropriately left to Congress. Suppose that a state legislature or the highest court of a State should determine that within its territorial limits no damages should be recovered in tort for pain and suffering, or for mental anguish, or that no punitive damages should be recoverable. Since the federal courts went out of the business of making "general law," *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, such decisions of local policy have admittedly been the exclusive province of state lawmakers. Should the civil liability for police conduct which can claim no authority under local law, which is actionable as common-law assault or trespass in the local courts, comport different rules? Should an unlawful intrusion by a policeman in Chicago entail different consequences than an unlawful intrusion by a hoodlum? These are matters of policy in its strictly legislative sense, not for determination by this Court. And if it be, as it is, a matter for Congressional choice, the legislative evidence is overwhelming that § 1979 is not expressive of that choice. Indeed, its precise limitation to acts "under color" of state statute, ordinance or other authority appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States except when a State seeks to shield those individuals under the special barrier of state authority. To extend Civil Rights Act liability beyond that point is to interfere in areas of state policymaking where Congress has not determined to interfere.

Nor will such interference be negligible. One argument urged in *Screws* in favor of the result which that case reached was the announced policy of self-restraint of the Department of Justice in the prosecution of cases under 18 U. S. C. § 242. See 325 U. S., at 159–160. Experience indicates that private litigants cannot be expected to show the same consideration for the autonomy

of local administration which the Department purportedly shows.[28]

Relevant also are the effects upon the institution of federal constitutional adjudication of sustaining under § 1979 damage actions for relief against conduct allegedly violative of federal constitutional rights, but plainly violative of state law. Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid those issues.[29] This would make

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[28] In the last twenty years the lower federal courts have encountered a volume of litigation seeking Civil Rights Act redress for a variety of wrongs ranging from arbitrary refusal by housing department officials to issue architect's certificates, *Burt* v. *New York*, 156 F. 2d 791 (C. A. 2d Cir.), to allegedly malicious charges made by a state grand jury. *Lyons* v. *Baker*, 180 F. 2d 893 (C. A. 5th Cir.). Plaintiffs have sought redress against the signers of a mandamus petition, parties to a state mandamus proceeding to compel city commissioners to hold a local referendum, *Lyons* v. *Dehon*, 188 F. 2d 534 (C. A. 5th Cir.), against state officials administering a local WPA project for refusing to employ the plaintiff and instituting insanity proceedings against him, *Love* v. *Chandler*, 124 F. 2d 785 (C. A. 8th Cir.), against adversaries and judge in a state civil judicial proceeding where egregious error resulting in holding against plaintiffs was alleged, *Bottone* v. *Lindsley*, 170 F. 2d 705 (C. A. 10th Cir.); *Campo* v. *Niemeyer*, 182 F. 2d 115 (C. A. 7th Cir.); cf. *Moffett* v. *Commerce Trust Co.*, 187 F. 2d 242 (C. A. 8th Cir.). Most courts have refused to convert what would otherwise be ordinary state-law claims for false imprisonment or malicious prosecution or assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation. *Lyons* v. *Weltmer*, 174 F. 2d 473 (C. A. 4th Cir.); *McGuire* v. *Todd*, 198 F. 2d 60 (C. A. 5th Cir.); *Curry* v. *Ragan*, 257 F. 2d 449 (C. A. 5th Cir.); *Deloach* v. *Rogers*, 268 F. 2d 928 (C. A. 5th Cir.); *Agnew* v. *City of Compton*, 239 F. 2d 226 (C. A. 9th Cir.).

[29] See, *e. g.*, *Valle* v. *Stengel*, 176 F. 2d 697 (C. A. 3d Cir.), a case which decides a number of novel and difficult questions of federal constitutional law. The alleged conduct of defendant sheriff which was held actionable under § 1979 was in violation of state law.

inroads, throughout a large area, upon the principle of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary. See *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496, and cases following. Self-limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power. Especially is this true where the circumstances under which those ultimate determinations must be made are not conducive to the most mature deliberation and decision. If § 1979 is made a vehicle of constitutional litigation in cases where state officers have acted lawlessly at state law, difficult questions of the federal constitutionality of certain official practices—lawful perhaps in some States, unlawful in others—may be litigated between private parties without the participation of responsible state authorities which is obviously desirable to protect legitimate state interests, but also to better guide adjudication by competent record-making and argument.

Of course, these last considerations would be irrelevant to our duty if Congress had demonstrably meant to reach by § 1979 activities like those of respondents in this case. But where it appears that Congress plainly did not have that understanding, respect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every

clerk in every municipal licensing bureau in this country. The text of the statute, reinforced by its history, precludes such a reading.

In concluding that police intrusion in violation of state law is not a wrong remediable under R. S. § 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious,[20] and obvious is the need for more effective modes of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common-law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves, in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state "statute, ordinance, regulation, custom, or usage" the police are specially shielded—§ 1979 provides a remedy which dismissal of petitioners' complaint in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and

[20] See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955); Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Cal. L. Rev. 565 (1955); cf. Edwards, Criminal Liability for Unreasonable Searches and Seizures, 41 Va. L. Rev. 621 (1955). And see, e. g., *State for Use Brooks* v. *Wynn*, 213 Miss. 398, 56 So. 2d 824

judges.[7] Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.

This is not to say that there may not exist today, as in 1871, needs which call for congressional legislation to protect the civil rights of individuals in the States. Strong contemporary assertions of these needs have been expressed. Report of the President's Committee on Civil Rights, To Secure These Rights (1947); Chafee, Safeguarding Fundamental Human Rights: The Tasks of States and Nation, 27 Geo. Wash. L. Rev. 519 (1959). But both the insistence of the needs and the delicacy of the issues involved in finding appropriate means for their satisfaction demonstrate that their demand is for legislative, not judicial, response. We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960.

Of an enactment like the Civil Rights Act, dealing with the safeguarding and promotion of individual free-

[7] The common law seems still to retain sufficient flexibility to fashion adequate remedies for lawless intrusions. Compare with the cases cited in *Wolf* v. *Colorado*, 338 U. S. 25, 30, n. 1; *Bull* v. *Armstrong*, 254 Ala. 390, 48 So. 2d 467 (1950); *Sarafini* v. *San Francisco*, 143 Cal. App. 2d 570, 300 P. 2d 44 (1956); *Ware* v. *Dunn*, 80 Cal. App. 2d 936, 183 P. 2d 128 (1947); *Walker* v. *Whittle*, 83 Ga. App. 445, 64 S. E. 2d 87 (1951); *Johnson* v. *Atlantic Coast Line R. Co.*, 142 S. C. 135, 140 S. E. 443 (1927); *Deaderick* v. *Smith*, 33 Tenn. App. 151, 230 S. W. 2d 406 (1950).

dom, it is especially relevant to be mindful that, since it is projected into the future, it is ambulatory in its scope, the statute properly absorbing the expanding reach of its purpose to the extent that the words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation. In one of the last writings by that tough-minded libertarian, who was also no friend of narrow construction, Professor Zechariah Chafee, Jr., he admonished against putting the Civil Rights Act to dubious new uses even though, as a matter of policy, they might be desirable in the changed climate nearly a hundred years after its enactment: "At all events, we can be sure of one thing. If federal protection be desirable, we ought to get it by something better than a criminal statute of antiquated uncertainties and based on the out-moded Privileges and Immunities Clause of the Fourteenth Amendment. . . . It is very queer to try to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant." *Id.*, at 529. It is not a work for courts to melt and recast this statute. "Under color" of law meant by authority of law in the nineteenth century. No judicial sympathy, however strong, for needs now felt can give the phrase—a phrase which occurs in a statute, not in a constitution—any different meaning in the twentieth. Compare Mr. Justice Holmes' varying approaches to construction of the same word in a statute and in the Constitution, *Towne* v. *Eisner*, 245 U. S. 418, and *Eisner* v. *Macomber*, 252 U. S. 189, 219 (dissenting).

This meaning, no doubt, poses difficulties for the case-by-case application of § 1979. Manifestly the applicability of the section in an action for damages cannot be made to turn upon the actual availability or unavailability

of a state-law remedy for each individual plaintiff's situation. Prosecution to adverse judgment of a state-court damage claim cannot be made prerequisite to § 1979 relief. In the first place, such a requirement would effectively nullify § 1979 as a vehicle for recovering damages.[72] In the second place, the conclusion that police activity which violates state law is not "under color" of state law does not turn upon the existence of a state tort remedy. Rather, it recognizes the freedom of the States to fashion their own laws of torts in their own way under no threat of federal intervention save where state law makes determinative of a plaintiff's rights the particular circumstance that defendants are acting by state authority. Section 1979 was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of state authority immunizes him from the ordinary processes of the law.

It follows that federal courts in actions at law under § 1979 would have to determine whether defendants' conduct is in violation of, or under color of, state law often with little guidance from earlier state decisions. Such a determination will sometimes be difficult, of course. But Federal District Courts sitting in diversity cases are often called upon to determine as intricate and uncertain questions of local law as whether official authority would cloak

[72] This is so not only because of the practical impediment to Civil Rights Act relief which would be posed by a two-suit requirement, but because the efficient process of judicial administration might well require that a plaintiff present his federal constitutional contention to the state courts along with his state-law contentions, that he there assert the federal unconstitutionality of maintaining the defense of state authorization to a state-law tort action. Cf. *Angel* v. *Bullington*, 330 U. S. 183. Of course, once the federal contention is properly presented to the state courts, plaintiff has open for review here an adverse state-court judgment; but if plaintiff were successful in this Court, the effect of our disposition would be to return plaintiff to the state courts for a state-law measure of relief.

a given practice of the police from liability in a state-court suit. Certain fixed points of reference will be available. If a plaintiff can show that defendant is acting pursuant to the specific terms of a state statute or of a municipal ordinance, § 1979 will apply. See *Lane* v. *Wilson*, 307 U. S. 268. If he can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, § 1979 will apply. See *Hague* v. *C. I. O.*, 307 U. S. 496. Beyond these cases will lie the admittedly more difficult ones in which he seeks to show some " 'custom or usage which has become common law." [73]

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[73] See note 57, *supra*. Cf. *The Civil Rights Cases*, 109 U. S. 3, 16. And see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369: "Here . . . all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

Where the jurisdiction of a Federal District Court is invoked to vindicate a claim under § 1979 and where that court finds that defendants' conduct is not under color of state law, difficult questions may also arise as to whether the court should nevertheless determine the respective rights of the parties at state law, under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 and *Bell* v. *Hood*, 327 U. S. 678. But see *California Water Service Co.* v. *City of Redding*, 304 U. S. 252; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (C. A. 1st Cir.); *Robinson* v. *Stanley Home Prods. Inc.*, 272 F. 2d 601 (C. A. 1st Cir.). Petitioners in this case have never throughout the litigation below raised the issue of the possible application of the *Hurn* rule to these circumstances, nor is that issue among the questions presented in their petition for certiorari here. Under our Rule 23 (c) it is not now, therefore, before the Court, and there is no intention here to intimate any opinion on the novel problem of federal jurisdiction of state-law claims "pendent" to such a case as

V.

My Brother HARLAN's concurring opinion deserves separate consideration. It begins by asking what is its essential question: Why would the Forty-second Congress, which clearly provided tort relief in the federal courts for violations of constitutional rights by acts of a policeman acting pursuant to state authority, not also have provided the same relief for violations of constitutional rights by a policeman acting in violation of state authority? What, it inquires, would cause a Congress to distinguish between the two situations? Examining a first possible differentiating factor—the differing degrees of adequacy of protection of person and property already available in the state courts—it reasons that this could not have been significant in view of Congress' purpose in 1871, for that purpose was not to enact a statute having "merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings." Examining the other possible distinction—the difference between injuries to individuals from isolated acts of abuse of authority by state officers and injuries to individuals from acts sanctioned by the dignity of state law—it finds that this, too, could not have been important, especially to a Congress which was aware of the existence of state constitutional guarantees of protection to the individual, and which enacted the conspiracy statute which became R. S. § 1980 and is now 42 U. S. C. § 1985.

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this. Suffice it to say that whatever application *Hurn* may have to these situations, its application will entail a very different level of federal judicial involvement with the adjudication of rights between individuals in a State than would the interpretation of § 1979 which petitioners urge. Whatever incursion into areas of conventionally exclusive state-court competence jurisdiction "pendent" to a § 1979 claim might entail would touch considerations not peculiar to § 1979, but rather which concern the *Hurn* doctrine.

To ask why a Congress which legislated to reach a state officer enforcing an unconstitutional law or sanctioned usage did not also legislate to reach the same officer acting unconstitutionally without authority is to abstract this statute from its historical context. The legislative process of the post-bellum Congresses which enacted the several Civil Rights Acts was one of struggle and compromise in which the power of the National Government was expanded piece by piece against bitter resistance; the Radicals of 1871 had to yield ground and bargain over detail in order to keep the moderate Republicans in line.[74] This was not an endeavor for achieving legislative patterns of analytically satisfying symmetry. It was a contest of large sallies and small retreats in which as much ground was occupied at any time as the temporary coalescences of forces strong enough to enroll a prevailing vote could agree upon. To assume that if Congress reached one situation it would also have reached another situation involving not dissimilar problems—assuming, *arguendo*, that the problems, viewed in intellectual abstraction, are not dissimilar—ignores the temper of the times which produced the Ku Klux Act. This approach would be persuasive only if the two situations, that of a state officer acting pursuant to state authority and that of a state officer acting without state authority, were so entirely similar that they would not, in 1871, have been perceived as two different situations at all. In view of the fierce debate which occupied the Forty-second Congress as to whether the Fourteenth Amendment had been intended to do more than invalidate state legislation offensive on its face,[75] this supposition must be ruled out.

[74] See the history of § 2 of the Ku Klux Act described, *supra*, at notes 44–50. For an excellent picture of the background of this legislative struggle, see McKitrick, Andrew Johnson and Reconstruction (1960).

[75] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess. 482, 505–506, 697, App. 81–86, 315.

Contrariwise, it is historically persuasive that the Forty-second Congress, which was not thinking in neat abstract categories, designed a statute to protect federal constitutional rights from an immediate evil perceived to be grave—the evil described by the statute's sponsor, Mr. Shellabarger, "such wrongs . . . as are done under color of State laws which abridge these rights," [26]—but did not, by the same measure, seek to control unconstitutional action abusive of a state authority which did not, itself, "abridge these rights."

Moreover, even under the most rigorous analysis the two situations argumentatively deemed not dissimilar are indeed dissimilar, and dissimilar in both of the two relevant aspects. As to the adequacy of state-court protection of person and property, there seems a very sound distinction, as a class, between injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state-court system to this Court) and injuries not sanctioned by state law. To make this line of distinction determine the incidence of Civil Rights legislation serves to cover the bulk of cases where federal judicial protection would be needed. To be sure, this leaves certain cases unprotected, namely, the few instances of federal constitutional violations not authorized by state statute, custom or usage and which concern interests wholly unrecognized by state statute or common law. But the cost of ignoring the distinction in order to cover those cases—the cost, that is, of providing a federal judicial remedy for every constitutional violation—involves pre-emption by the National Govern-

[26] *Id.*, at App. 68.

ment, in the larger class of cases in which rights secured by the Fourteenth Amendment relate to interests of person and property having a state-law origin, of matters of intimate concern to state and local governments. One of the most persistently recurring motifs in the legislative history of the Ku Klux Act is precisely a reluctance to invade these regions of state and local concern except insofar as absolutely necessary for effective assurance of the Fourteenth Amendment's guarantees. Therefore, the line of distinction between state-authorized and unauthorized actions, as a line of compromise among positions concerning which the legislative evidence is clear that Congress wanted to, and did, compromise, is the most probable for the Act's draftsmen to have selected.

To attribute significance to this line of distinction is not to reduce the Ku Klux Act to having "merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court" to an original federal tribunal. First, there are certain classes of cases where § 1979, construed as reaching only unconstitutional conduct authorized by state law, will accord "substantive" relief that would not have been available through the means of state-law, state-court litigation subject to the commands of the Supremacy Clause and to Supreme Court review. This would be the case, for example, if a Negro were to bring an action for damages against a state election official who had denied him the right to vote pursuant to discriminatory state franchise provisions [11] in a State which did not recognize a common-law action for deprivation of the right to vote. Similarly, one whose home had been searched by state police acting under a state statute, regulation, custom or usage which authorized an unconstitutional intrusion could recover by a § 1979 action a measure of relief determined, as a "substantive" matter, by federal law, whereas

[11] See, e. g., *Lane* v. *Wilson*, 307 U. S. 268.

Supreme-Court-reviewed state-court suit might have availed him only damages for technical trespass. And, second, with reference to the more numerous classes of cases in which the redress which a federal trial court might give would be approximately the same, "substantively," as that which could be recovered by state-court suit, the theory that the Reconstruction Congress could not have meant § 1979 principally as a "jurisdictional" provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, forgets how important providing a federal trial court was among the several purposes of the Ku Klux Act.[78] One may agree that in one sense § 1979 is not "merely" jurisdictional—not jurisdictional in the sense, for example, that § 3 of the 1866 Civil Rights Act was jurisdictional.[79] Section 1979 does create a "substantive" right to relief. But this does not negative the fact that a powerful impulse behind the creation of this "substantive" right was the purpose that it

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[78] See, *e. g.*, the pages of debate cited in note 46, *supra*.

[79] That section gave the District and Circuit Courts of the United States concurrent jurisdiction of all causes, civil and criminal, "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section" of the 1866 Act. It further provided: "The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause. . . ." Act of April 9, 1866, § 3, 14 Stat. 27.

be available in, and be shaped through, original federal tribunals.

In truth, to deprecate the purposes of this 1871 statute in terms of analysis which refers to "merely . . . jurisdictional" effects, to "shifting the load of federal supervision," and to the "administrative burden on the Supreme Court," is to attribute twentieth century conceptions of the federal judicial system to the Reconstruction Congress. If today Congress were to devise a comprehensive scheme for the most effective protection of federal constitutional rights, it might conceivably think in terms of defining those classes of cases in which Supreme Court review of state-court decision was most appropriate, and those in which original federal jurisdiction was most appropriate, fitting all cases into one or the other category. The Congress of 1871 certainly did not think in such terms. Until 1875 there was no original "federal question" jurisdiction in the federal courts,[50] and the ordinary mode of protection of federal constitutional rights was Supreme Court review.[51] In light of the then prevailing notions of the appropriate relative spheres of jurisdiction of state and federal courts of first impression, any allowance of Federal District and Circuit Court competence to adjudicate causes between co-citizens of a State was a very special case, a rarity.[52] To ask why, when such a special case

[50] Except, of course, during the time between the Act of February 13, 1801, § 11, 2 Stat. 92, and its repeal by the Act of March 8, 1802, § 1, 2 Stat. 132. "Federal question" jurisdiction was conferred by the Act of March 3, 1875, § 1, 18 Stat. 470.

[51] Recognition of this situation underlies the comments of Messrs. Blair and Storm, see note 57, *supra*, and the debate among Senators Edmunds, Trumbull and Carpenter referred to in the concurring opinion. See especially Cong. Globe, 42d Cong., 1st Sess. 576–578.

[52] This is why Mr. Carpenter speaks of the Fourteenth Amendment's Enforcement Clause as working "one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution." *Id.* at 577.

was created to redress deprivations of federal rights under authority of state laws which abridged those rights, a special case was not also created to cover other deprivations of federal rights whose somewhat similar nature might have made the same redress appropriate, disregards the dominant jurisdictional thought of the day and neglects consideration of the fact that redress in a federal trial court was then to be very sparingly afforded. To extend original federal jurisdiction only in the class of case in which, constitutional violation being sanctioned by state law, state judges would be less likely than federal judges to be sympathetic to a plaintiff's claim, is a purpose quite consistent with the "overflowing protection of constitutional rights" which, assuredly, § 1979 manifests.[33]

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[33] See the remarks of Mr. Dawes, a member of the Committee which reported the Ku Klux bill, *id.*, at 476:

"The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity if need be, but always according to the law and the fact, as that great tribunal of the Constitution."

And see, *e. g.*, the remarks of Mr. Coburn, *id.*, at 459–460:

"Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed . . . .

"Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are

Finally, it seems not unreasonable to reject the suggestion that state-sanctioned constitutional violations are no more offensive than violations not sanctioned by the majesty of state authority. Degrees of offensiveness, perhaps, lie largely in the eye of the person offended, but is it implausible to conclude that there is something more reprehensible, something more dangerous, in the action of the custodian of a public building who turns out a Negro pursuant to a local ordinance than in the action of the same custodian who turns out the same Negro, in violation of state law, to vent a personal bias? Or something more reprehensible about the public officer who beats a criminal suspect under orders from the Captain of Detectives, pursuant to a systematic and accepted custom of third-degree practice, than about the same officer who, losing his temper, breaks all local regulations and beats the same suspect? If it be admitted that there is a significant difference between the situation of the individual injured by another individual and who, although the latter

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further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so.

is an agent of the State, can claim from the State's judicial or administrative processes the same protection and redress against him as would be available against any other individual, and the situation of one who, injured under the sanction of a state law which shields the offender, is left alone and helpless in the face of the asserted dignity of the State, then, certainly, it was the latter of these two situations—that of the unprotected Southern Negroes and Unionists—about which Congress was concerned in 1871."[1]

Again, an analysis which supposes that Congress, by §§ 1 and 2[2] of the Ku Klux Act, was attempting to pro-

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[1] It is suggested that Congress knew there existed state constitutional guarantees of which state legislation might fall afoul, and that nevertheless there is found in the debates no "explanation of [the] exception to the general rule" which would obtain if § 1979 were applied to conduct authorized by state statute, ordinance, regulation, custom or usage, but violative of a state constitution. To regard such an application as an "exception" is to misconceive the incidence of § 1979 by regarding its operation from the wrong perspective. The question whether official action does or does not come within the statute depends not upon what state law the action does or does not violate, but upon what state law does or does not authorize the action. The state authorization against which Congress aimed § 1979 was authorization by the living, functioning law of the State, not authorization in strict conformity with what may have become no more than an unheeded pattern of words upon the closed pages of a State's books of legal learning. It meant to reach those "Deeply embedded traditional ways of carrying out state policy [which] . . . are often tougher and truer law than the dead words of the written text," see note 73, *supra*, and it would by its terms have reached the case supposed by my Brother HARLAN not as a matter of exception in need of explanation, but by its natural logic.

[2] Section 2 of the Ku Klux Act attached civil and criminal liability to conspiracy "for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State

vide comprehensive coverage of a single problem and, therefore, may not be supposed to have left any aspect of the problem unprovided for, ignores that these two sections were in fact designed to cope with two wholly different problems—two wholly diverse evils. Section 2 was newly drafted in 1871, not, like § 1, taken over from the 1866 Act. It was both civil and criminal, not, like § 1, merely civil. It aimed exclusively at conspiracies, as § 1 did not. And, most important, it sought to protect only the federal right of equal protection, not, like § 1, all Fourteenth Amendment rights.[9] Because of its limited scope in this latter respect, those who drafted it and voted for it thought that it could constitutionally be made to reach instances of action having more tenuous connection with the lawfully asserted authority of the State than could a statute which also reached due process violations.[10] For the same reason, it does not reach isolated instances of misuse of state authority, but only such as

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the equal protection of the laws . . . ." 17 Stat. 13. The civil provisions of this section were carried forward, as amended, in R. S. § 1980, and are now found in 42 U. S. C. § 1985. The criminal provisions, carried forward in R. S. § 5519, were declared unconstitutional in *United States* v. *Harris*, 106 U. S. 629, and *Baldwin* v. *Franks*, 120 U. S. 678.

[9] See Cong. Globe, 42d Cong., 1st Sess. 478, App. 315.

[10] The Fourteenth Amendment provides that no State shall "deprive" any person of life, liberty, or property without due process of law, and that no State shall "deny" to any person within its jurisdiction the equal protection of the laws. It is clear that the Forty-second Congress believed that "denial" could be worked by non-action, while "deprivation" required ill-action; thus, that the scope of federal enforcing power under the Equal Protection Clause reached further, in respect of situations in which there was no assertion of legitimate state authority, than did the equivalent scope of power under the Due Process and Privileges and Immunities Clauses. See, *id.*, at 459, 482, 505–506, 514, 607–608, 697, App. 251, 315. This appears to be why § 2 was acceptable in its amended, while not in its original, form.

possess the character of "purposeful discrimination" [28] which amounts to a denial of equal protection. The evil that § 2 meant to stamp out was the evil of conspiracy—more particularly, the evil of the Klan, "a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the 'carpetbag' and 'scalawag' governments of the day," that it appeared "able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication." *Collins* v. *Hardyman*, 341 U. S. 651, 662.[29] The enormity and the power of this organization were what made it dangerous.[30] Section 1 aimed at another evil, the evil not of combinations dedicated to purposeful and systematic discrimination, but of violation of any rights, privileges, or immunities secured by the Constitution through the authority, enhanced by the majesty and dignity, of the States. Here it was precisely this authorization, this assurance that behind a constitutional violation lay the whole power of the State, that was the danger. One can agree that these two statutory sections may overlap unevenly rather than dovetail, but surely it is more plausible to regard this uneven overlap as a result of the diverse origins and purposes of the sections than to derive from it the justification for a construction of § 1979 which distorts the section by stretching it to cover a class of case presenting *neither* the evil with which § 1, *nor* the evil with which § 2, of the Ku Klux Act was designed to cope.

[28] *Snowden* v. *Hughes*, 321 U. S. 1, 9; see also *Lisenba* v. *California*, 314 U. S. 219, 226.

[29] I agree that this is not the appropriate occasion to pass upon the construction of § 1985.

[30] For an appreciation of the nature and character of the Ku Klux Klan as it appeared to Congress in 1871, see S. Rep. No. 1, 42d Cong., 1st Sess., and the voluminous report of the Joint Select Committee to inquire into the Condition of Affairs in the late Insurrectionary States, published as S. Rep. No. 41, pts. 1–13, and H. R. Rep. No. 22, pts. 1–13, 42d Cong., 2d Sess.

VI.

The present case comes here from a judgment sustaining a motion to dismiss petitioners' complaint. That complaint, insofar as it describes the police intrusion, makes no allegation that that intrusion was authorized by state law other than the conclusory and unspecific claim that "During all times herein mentioned the individual defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the defendant City of Chicago." In the face of Illinois decisions holding such intrusions unlawful and in the absence of more precise factual averments to support its conclusion, such a complaint fails to state a claim under § 1979.

However, the complaint does allege, as to the ten-hour detention of Mr. Monroe, that "it was, and it is now, the custom or usage of the Police Department of the City of Chicago to arrest and confine individuals in the police stations and jail cells of the said department for long periods of time on 'open' charges." These confinements, it is alleged, are for the purpose of interrogating and investigating the individuals arrested, in the aim of inducing incriminating statements, permitting possible identification of suspects in lineups, holding suspects incommunicado while police conduct field investigations of their associates and background, and punishing the arrested persons without trial. Such averments do present facts which, admitted as true for purposes of a motion to dismiss, seem to sustain petitioners' claim that Mr. Monroe's detention—as contrasted with the night-time intrusion into the Monroe apartment—was "under color" of state authority. Under the few relevant Illinois decisions it is impossible to say with certainty that a detention

incommunicado for ten hours is unlawful *per se*,[91] or that the courts of that State would hold that the lawless circumstances surrounding Mr. Monroe's arrest made his subsequent confinement illegal. On this record, then, petitioners' complaint suffices to raise the narrow issue of whether the detention *incommunicado*, considered alone, violates due process.[92]

Since the majority's disposition of the case causes the Court not to reach that constitutional issue, it is neither necessary nor appropriate to discuss it here.

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[91] Compare *People* v. *Frugoli*, 334 Ill. 324, 166 N. E. 129 (1929); and *Fulford* v. *O'Connor*, 3 Ill. 2d 490, 121 N. E. 2d 767 (1954), with *People* v. *Kelly*, 404 Ill. 281, 89 N. E. 2d 27 (1949).

[92] In considering the detention of Mr. Monroe as isolable from the invasion of the Monroe home for purposes of applying § 1979, one does not ignore that in its treatment of coerced-confession cases and deprivation-of-counsel cases coming here from state courts, this Court has looked to the whole sequence of activity by state authorities pertinent to the prosecution of a criminal defendant. *Malinski* v. *New York*, 324 U. S. 401, 412 (concurring opinion joined in, and made a majority view, at 438); *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Gibbs* v. *Burke*, 337 U. S. 773. But these cases differ from the one at bar precisely in the fact that they do come here after the sustaining of a criminal conviction by the highest court of a State competent to act in the matter. In all such cases the processes of law administration of a State have rendered the final judgment of state law, and the federal question presented is whether the conviction has, in light of the totality of the events leading to that conviction, violated due process. The question in the instant case is the much narrower one whether petitioners have alleged conduct "under color" of state authority which deprives them of a Fourteenth Amendment right, and thus brought respondents' conduct within the specific requirements of the statute for initiating litigation in a Federal District Court.